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THE

Weekly Reporter, APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, VIZ., IN CIVIL, REVENUE
AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE CALCUTTA AND MOFUSSEE
CAUSE COURTS AND THE RECORDERS' COURTS; TOGETHER WITH RULES AND
THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH
COURT, AND CIRCULAR ORDERS OF THE BOARD OF REVENUE;
ALSO DECISIONS OF HER MAJESTY'S PRIVY COUNCIL
IN CASES HEARD IN APPEAL FROM COURTS
OF BRITISH INDIA.

By D. SUTHERLAND, MIDDLE TEMPLE.

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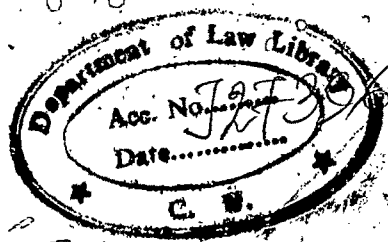
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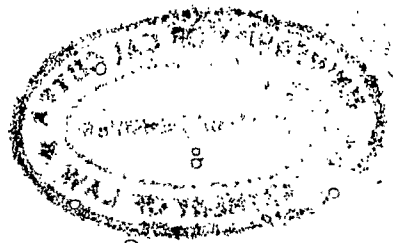
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(4) Where an auction-purchaser brought a suit to obtain possession of certain julkurs, which he alleges formed part of his zemindaree of S, the defendant being in possession thereof, and his possession having been confirmed in an Act IV case, HELD that the burden of proof rested on the plaintiff to show that the julkurs in dispute formed part of the assets of the zemindaree at the time of the perpetual settlement; and also that the plaintiff not having objected before the High Court to the Court of first instance having delegated the decision of the main point in the case to an Ameen, could not take that objection before the Judicial Committee ...	44
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how he got it) to R N as the gomastah of the idol for full consideration which was provided by B, the shebait. Later, a deed was executed by R N conveying the property to the idol and the shebait. Both the above deeds were registered. B then mortgaged the property to K L, who was subsequently paid off by B's widow K (who had been appointed by B manager and owner) with funds borrowed from W and J on mortgage of the property. W and J ultimately foreclosed, and were put in possession 47 years before the commencement of the present suit:	
HELD that as the idol was not set up for the benefit of public worship, no priests appointed, or brahmins having a legal interest in the fund, the property was not an endowment by B for the benefit of the idol so as to be perpetual and inalienable.	
HELD that K, as widow, was entitled to alienate the property (as she did) for the purpose of paying off her husband's debts.	
HELD that the suit was barred by limitation. The duty of observing the High Court Circular of 1867, regarding the reception of documentary evidence, enjoined ...	95
(6) The prohibition against alienation which is involved in an attachment, avoids the conveyance only as against the execution-creditor, or some person entitled to claim under him.	
A conveyance executed by the judgment-debtor after one attachment has been permanently struck off, and before a new attachment is issued, is valid. The striking an execution proceeding off the file in India is an act which may admit of different interpretations according to the circumstances; but when a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained ...	133
(7) Under the Mithila law, self-acquired property can be given by its owner at his pleasure. The Mitakshara law requires the son's consent; but the fact of the son's being in debt does not incapacitate him from consenting ...	137

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- (8) Where a party seeks to turn out another in possession of chur land which plaintiff claims as a part of a mehal purchased by him from Government, the suit is in the nature of an ejectment suit, and the plaintiff must recover on the strength of his own title, and not upon the weakness of that of his adversary. It is immaterial in such a case to consider whether or not the land is the property of the defendant; because unless it is proved to be the property of the plaintiff, the latter is not entitled to turn out the former ... 211
- (9) Although writing is not necessary to the validity of a divorce under Mahomedan law, yet where a divorce takes place between persons of rank and property, and where valuable rights depend upon the marriage, and are affected by the divorce, the parties, for their own security, may be expected to have some document affording satisfactory evidence of what they have done. If a Cazee was present at a marriage which is disputed with a show of probability, he should be called as a witness where the marriage is to be proved ... 214
- (10) The mohunt of the muth of Tirpuntal, Zillah Tanjore, in the Madras Presidency, sued the mohunt of the muth at Benares in the Civil Court of Zillah Benares for the right to manage as proprietor of the muth and chuttur affairs at Benares and the temple of Sri Kedareshur, and to recover property belonging thereto, and to have an account of receipts and disbursements relative to the same: such relief being claimed by virtue of his proprietary right as mohunt and guddee-nasheen of the headquarters muth at Tirpuntal, under whose jurisdiction and power the chuttur institution at Benares had continued from time immemorial. The defendant denied plaintiff's claim to the immoveable property and endowment which he represented as acquired by his ancestors, the mohunt's guddee-nasheens at Benares, and himself. He denied that he was an agent, and claimed to be the real proprietor in possession and occupation by right of succession to his ancestors.

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- The first Court decreed plaintiff's claim. The High Court modified the decree, giving plaintiff possession of certain chuttur and gardens built or purchased out of funds remitted from Madras, and declaring him entitled to an account of a sum admitted to have been remitted from Tirpuntal, but holding that he had failed to make out possession of the muth, temple, or other property:
- HELD that the original foundation having been admittedly at Benares, which is the holy place, and the object having been to afford to persons either resident in the south of India, or making pilgrimage to Benares, facilities for worship and religious duties there, raised a presumption that the establishment at Tirpuntal was subordinate to that at Benares: and that it was not shown that any change had been effected in the original constitution of the community.
- HELD that the nature of the relations between the muths at Tirpuntal and Benares was that the former fed the establishment at the latter, the object of which was to afford facilities to pilgrims and others wishing to pay their devotions at Benares; the result was that the establishment at Tirpuntal collected alms and remitted them to Benares, producing complicated exchange transactions between the two establishments.
- HELD that plaintiff had failed to establish either that he was the proprietor of the property at Benares, or that defendant was his mere agent, and that the High Court was right in limiting the relief to what was included in its decree ... 217
- (11) Though an island or land thrown up and surrounded by a river, may become vested in Government under the provisions of Regulation XI of 1825 s. 4 cl. 4, it does not follow that, if the river which separates the island from the main land dries up after the island has been resumed by Government, the bed of the river becomes the property of Government in cases in which the bed of the river is not gained as an accretion to the island by gradual accession within the meaning of cl. 1 ... 276

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- (12) The limitation enacted in Act XIV of 1859 s. 1 cl. 15 embraces every kind of mortgage, including usufructuary mortgages.

The acknowledgment referred to in the said Clause must bear the signature of the mortgagee himself; the signature of an agent would not satisfy. The words of the statute, being one of limitation, ought to receive such a construction as the language in its plain meaning imports ... 375

- (13) In a suit brought by the heir-at-law to recover possession of immoveable property devised by his father to one B, where *inter alia* plaintiff sought to set aside the will on the ground that the testator had not the power to make any of the devises of realty that it contained, inasmuch as he could not devise ancestral real property, and both parties invoked the opinion of the Court upon this question, which was raised by the pleadings and argued:

HELD that the judgment on it was not *ultra vires* merely because an issue was not framed which, strictly speaking, embraced the whole of it, and that the Court were called upon to decide whether or not the will was operative as to all, or to any, or what portion of the property.

HELD that the Court had power, with the consent of the parties, to substitute for the relief specially sought, *viz.*, the cancellation of the will, the simple declaration that such deeds could not affect the ancestral property, and that they were at liberty to sue afresh to recover such property.

The words "cause of action" in Act VIII of 1859 s. 2 are to be construed with reference rather to the substance than the form of action ... 377

- (14) A durputnee was granted by defendants with full powers of sale or gift to S, who sold it to plaintiffs with the stipulation that plaintiffs would cause the requisite mutation of names in the putneedar's books; but that, in case of delay in the substitution of plaintiffs' names, S would not be entitled to profit or subjected to loss. Plaintiffs did not register the transfer, and were not recognized by defendants as their tenants. But in order to stay the sale of the putnee talook for an arrear of rent

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due to the zemindar by the putneedars (defendants), and thereby save the durputnee, plaintiffs on 17th November 1864 lodged a sum of money in the Collector's Court. Plaintiffs, after infructuous litigation in the Courts of Hooghly, brought a suit on 8th June 1869, to recover the money deposited, and obtained a decree which was subsequently upheld by the High Court:

HELD that the decision of the High Court was correct, the payment not having been voluntary, but one which the plaintiffs were compelled to make.

Until such an assignment as the one in the above case has been registered, or the assignee has been accepted by the putneedar as his tenant, the assignor is not discharged from liability which may be enforced by sale of the durputnee in execution.

According to the true construction of Act XIV of 1859 s. 14, a plaintiff is entitled to deduction of the whole time in which he has been fruitlessly engaged in prosecuting a suit *bona fide* and with due diligence for the same cause of action, in which he fails in consequence of a final determination that the Court had no jurisdiction. 380

- (15) At the permanent settlement the River Gunduck divided Mouzah Sohagpore (Zillah Tirhoot) from the village of Doomree (Zillah Sarun). In 1837, the river got into its southern channel, and a quantity of chur land to the north was resumed by Government and settled with the zemindars of Sohagpore. In 1846 it was again settled with the same zemindars, who remained in possession till 1848, when the river having returned to its northern channel, the deara land was claimed by proprietors on the southern or Sarun side of the river. The consequence was an Act IV of 1840 suit which was decided in favor of the zemindars of Sohagpore. In 1856, on the expiry of the last temporary settlement, the question arose with whom Government should engage for the revenue, and it was finally decided by the Board of Revenue that a settlement should be made with the zemindars of Doomree, who accordingly obtained possession. The Board's decision proceeded on two principles, *viz.*,

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that an usage existed that the main channel of the Gunduck should be the boundary of the zemindaries, and that therefore the interest of the zemindars of Sohagpore had been of a limited, temporary, and conditional character.

These zemindars then brought a suit to impeach this settlement and to recover possession. After decision, appeal, and remand, it was finally decided by the High Court that the land in dispute was identical with that formerly settled with the maliks of Sohagpore who (it was assumed) had a permanent proprietary interest therein:

Held that the proper issues to be tried were, 1st, whether the land had been settled in 1837 with the maliks of Sohagpore as proprietors of alluvium which had gradually accreted to their estate; or upon what other grounds such settlement was made,—the onus of proving gradual accretion being on the plaintiffs; and, 2ndly, whether there was at the permanent settlement, and has been since, a clear and definite usage such as supposed by the Board of Revenue,—the burden of proving the affirmative of this being on the defendant ... 427

(16) A mere refusal to grant a review of judgment cannot alter the judgment sought to be reviewed, or the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree.

A former suit for a share of property purchased in the name of G, which claimed it to be joint property, does not bar the plaintiff from suing for other property, which was bought in the name of M at another time, the latter claim being no part of the claim arising out of the cause of action in respect of the property first mentioned, so as to come within the meaning of Act VIII of 1859 s. 7 ... 450

(17) N, a durputneedar, sued for a declaration that certain lands which defendants claimed to hold as lakheraj were held under an invalid title; the plaint stating that the suit was brought under Regulation II of 1819 s. 30 cl. 1. The first Court found that 2 beegahs 1 cottah of the land were

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not within plaintiff's putnee; that 12 beegahs 14½ cottahs had been enjoyed rent-free from before 1st December 1790; and that the rest was liable to assessment. The Lower Appellate Court confirmed the decision as to the 2 beegahs 1 cottah, but decreed the rest of the plaintiff's claim, finding that defendants had failed to prove a valid title, or that the land had been held rent-free for a period commencing before 1st December 1790. In special appeal, the High Court remanded the case for re-trial, stating that the onus had been mis-placed:

Held that the remand for re-trial upon an amended plaint was not only correct, but an indulgence to the plaintiff, whose suit ought otherwise to have been dismissed; the invocation of Regulation II of 1819 s. 30 having the effect of causing the case to be tried according to the procedure and presumptions prescribed by that enactment to the prejudice of the defendant.

If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it lies upon the plaintiff to prove a *prima facie* case, i.e., his case being that his māl land has since 1790 been converted into lakheraj, to give some evidence that his land was once māl. The burden is not met by the mere fact of the lands being within the ambit of his estate.

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(2) *Quære*.—Where, either under s. 119, Code of Civil Procedure, or in the exercise of the power of review, a suit is restored to its original position, is the plaintiff bound to obtain and issue fresh summonses? 2

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- (2) To justify an order under s. 491 Act X of 1872, calling on a person to give security to keep the peace, there must be a reasonable probability of a — being committed, and not merely a bare possibility of a —.
- (3) In a case of dispute regarding land between A. and B. (the latter a resident of another district), a

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		(1) The High Court refused to interfere on a reference made to it by a Deputy Commissioner in a case which was sent up for heavier punishment to the Deputy Commissioner under s. 46, Code of Criminal Procedure, by a Magistrate of the second class; as the Court was of opinion that the Deputy Commissioner, instead of referring the case, ought under that Section to have tried the prisoners himself, and convicted them of any offence which he thought was made out against them by the evidence ...	15
		(2) In a case in which the accused caused the death of a woman by beating, the medical officer who held the <i>post mortem</i> examination considered that death resulted from rupture of the spleen, but the Civil Surgeon said that no opinion of the cause of death could be formed.	
		The accused having been convicted of causing grievous hurt, and sentenced to six months	
OATH.			
See Jury (1)			
OBSTRUCTION.			
See Nuisance (1)			
OFFENCE.			
See False Information.			
OPIUM.			
Where — was found in the possession of a person who was a servant of the accused, and who alleged that he obtained it from the wife of the accused, and that the wife had purchased it from an — cultivator, it was held that the accused could not be convicted under s. 53 Act XXI of 1856, as it had not been shown that the purchase by his wife was authorized by the accused, and therefore her possession of the —, or that of the servant, could not be considered the possession of the accused ...	54		

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		REFERENCE.	
		<i>See High Court (8) (12) (15) (16) (17)</i> <i>See Procedure (1)</i>	
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		<i>See High Court (6)</i>	
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		<i>See Full Bench Rulings.</i>	
		S	
		SECURITY.	
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PROSECUTION.			
<i>See Witness (1)</i>			
PUBLIC SERVANT.			
<i>See Forgery (2)</i>			
PUBLIC WAY.			
<i>See Nuisance (1)</i>			
PUNISHMENT.			
In a case of several offences under one Section of the Penal Code, the proper way is to try the accused (under separate charges) for each of the several distinct offences			

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The Sessions Judge considered that s. 418 was not intended to supersede s. 108 Act IX of 1872, and that, as under the latter law, the property in the pony did not pass to the third party, purchaser, the pony should have been restored to the prosecutor:		UNLAWFUL ASSEMBLY.	
HELD that the fine of Rs. 25 imposed upon the prisoner could not be paid over to the complainant, either under s. 418, Code of Criminal Procedure, or under any supposed rule of law relating to sales in market overt; and that if any		In this case in which the prisoners were convicted of being members of an — under s. 141 of the Penal Code, the Court held that the evidence was insufficient to warrant a conviction, there being nothing to show what was the specific unlawful object, within the scope of cls. 3 and 4, of the persons composing the assembly ...	78
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The Weekly Reporter,

CIVIL RULINGS.

The 24th April 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Reversioner—Right of Suit—Limitation.

Case No. 804 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 22nd February 1872, reversing a decision of the Officiating Subordinate Judge of that district, dated the 29th July 1871.

Bishonath Surmah and others (Defendants)
Appellants,

versus

Sreemutty Shushee Mookhee (Plaintiff)
Respondent.

Mr. R. E. Twidale and Baboo Aukhil Chunder Sen for Appellants.

Baboos Sreenath Banerjee and Romesh Chunder Mitter for Respondent.

A party desirous, as a reversioner, to obtain a declaration of his rights affected by a sale or gift made by a Hindoo widow must bring his suit within twelve years of the alienation. After the death of the widow, the remedy open to him is of a different description.

Jackson, J.—THIS was a suit by the daughter to set aside an act of alienation made by her mother in 1855, and to have the daughter's reversionary right declared notwithstanding such alienation, the mother being still living, and fifteen years having elapsed from the date of the alienation at the commencement of the suit. The lapse of this time seems to have escaped the notice of the Subordinate Judge. He went into the ques-

tion of the necessity or otherwise of alienation, and on that point he found in favor of the defendant. The case went on appeal before the District Judge, Mr. C. D. Field, and he, in discussing the plaintiff's right to recover, appears to have lost sight of the objection which was manifestly raised by the defendant that this suit was barred by limitation. The judgment of the District Judge, who reversed the decree of the Subordinate Judge, is now before us in special appeal, and the point of limitation is now raised. The very facts which would have supported and which do support this plea of limitation are raised in the grounds of special appeal; but curiously enough for another reason and in another shape. It is said "that when the plaintiff admits that a sale was executed in 1855, at which time the purchasers got possession, that in execution of a decree against the purchasers, their rights were purchased by the second set of defendants, and that, in execution of a decree against those second set of defendants, the property was purchased by your petitioners, and when there is no allegation of fraud as to these purchases, which are *bonâ fide* made, then the plaintiff's claim for a declaratory decree ought to have been dismissed on the ground of her long silence and acquiescence for a period of above sixteen years." Although this point, therefore, was not directly taken in the grounds of special appeal, it seems to us from the very nature of the suit that it is one which ought to be allowed to be taken, and which therefore we have allowed to be taken. It appears that the plaintiff, the daughter, was not only in the same position of reversioner which she now holds, but she was actually a party to the legal proceedings, ending in a decree, in part satisfaction of which the alienation complained of was made. It has been held in many cases by

this Court that a party desirous as a reversioner to obtain a declaration of his rights affected by a sale or gift made by a Hindoo widow must bring his suit within twelve years of the alienation, and that it is a remedy of a different description which is open to him after the death of the widow.

Under these circumstances, we have no choice but to reverse the decisions of the Courts below and dismiss the plaintiff's suit with all costs.

The 24th April 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Minor's Right of Action—Limitation—Act XIV of 1859 s. 2.

Case No. 805 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 9th March 1872, reversing a decision of the Officiating Subordinate Judge of that district, dated the 28th August 1871.

Taruck Chunder Sen (Plaintiff) *Appellant*,
versus

Doorga Churn Sen (Defendant) *Respondent*.

Mr. R. E. Twidale and Baboo Aukhil Chunder Sen for Appellant.

Baboo Motee Lall Mookerjee for Respondent.

Case.—Plaintiff sued to recover certain moneys from defendant who had been appointed manager of property which plaintiff's late uncle had conveyed to him by a will, and who had obtained a certificate under Act XL of 1858. Plaintiff alleged among other things that defendant as manager had sued for money due on a bond executed by one T; but that the suit was dismissed as barred by limitation to the plaintiff's prejudice. The Lower Appellate Court held that the defendant could not be made liable; but that the dismissal of the suit on the ground of limitation would be no bar to a suit by the minor within three years of his attaining his majority.

Held that, as the cause of action in respect of the bond had arisen in the lifetime of the testator, no further time would, under the proviso in Act XIV of 1859 s. 2, be allowed to plaintiff by reason of his previous legal disability.

Jackson, J.—The only ground on which the special appellant appears justly to impugn the judgment of the Lower Appellate Court is that which relates to the bond given by one Tiluck Chunder the amount whereof the defendant seems to have omitted to sue

for and to realize. It appears that a suit on that bond was commenced, if not by the defendant, in the name of the defendant, though the defendant states that this suit was really brought without his knowledge or authority by the plaintiff's brother. The defendant's liability as to this amount has been got rid of by the Lower Appellate Court in the following words:—"The dismissal of the suit by the manager and guardian on the ground of limitation will be no bar to a suit by the minor within three years of his attaining his majority, having reference to Section 2, Act XIV of 1859, and the law already referred to." It is not clear what is meant by "the law already referred to," but Section 2 of the Limitation Act says:—"The action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person, or of the legal disability of any person claiming through him."

Now it appears that the cause of action in respect of the bond in question had arisen during the lifetime of the testator, and therefore under that proviso a further time would not be allowed to the present plaintiff by reason of his previous legal disability. It will, therefore, have to be determined whether the defendant is not liable to the plaintiff for the amount of this bond, and if so, to what extent the account between the parties will be affected by the liability. For this purpose the case will go back to the Lower Appellate Court.

The 24th April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Adjournment under Act VIII of 1859 s. 146—Rescission of Order of Adjournment—Retrial—Fresh Summonses.

Case No. 1111 of 1872.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 14th June 1872, affirming a decision of the Subordinate Judge of that district, dated the 29th February 1872.

Bishen Perkash Singh and others (Plaintiffs)
Appellants,

versus

Ruttun Geer Chela and others (Defendants)
Respondents.

Mr. C. Gregory for Appellants.

Mr. R. E. Twidale for Respondents.

Where an order was regularly made by a Moonsiff under Act VIII of 1859 s. 146, granting time to the parties, adjourning the hearing, and fixing a day for the further hearing, but was rescinded on the same day, on the application of the defendant, and the case tried on the following day when all the evidence which the plaintiff was entitled to produce was not before the Court:

Held that, as it was not shown that the rescinding order was regularly and properly made, there was a defect in the procedure and a defect in law which might most materially have affected the decision on the merits.

Quere.—Where, either under s. 119, Code of Civil Procedure, or in the exercise of the power of review, a suit is restored to its original position, is the plaintiff bound to obtain and issue fresh summonses?

Couch, C.J.—In this case we have to consider what took place subsequently to the order of the 3rd of February. By that, which was made either under Section 119 of the Code of Civil Procedure, or in the exercise of the power of review, the judgment or decision which had been previously passed was set aside, and the suit was restored to the position in which it would have been if that judgment had not been passed, and was to be regularly heard. The 23rd of February was appointed for the hearing, and it seems that on the 10th of February, on the application of the defendant, that date was altered, and it was ordered that the case should be heard on the 27th. Therefore, as regards the plaintiffs, it is as if the 27th was the date fixed for the hearing by the order of the 3rd of February. On the 27th the case could not be heard, because that day was made a general holiday subsequently to the making of the order on the 10th. The plaintiff appeared on the day fixed, namely, the 28th.

The orders do not state fully how the parties appeared, but on the 28th the Moonsiff made an order for the postponement of the hearing to the 12th of March, and he ordered that two of the witnesses for the plaintiff who were not present should be

summoned. The order does not in terms say that the hearing was adjourned, but that must be what was meant, because it says that the 12th of March is to be fixed for the hearing. That was a regular order which he had power to make under Section 146, granting time to the parties and adjourning the hearing and fixing a day for the further hearing.

Then it would seem that on the same day after he had made that order, on the application of the defendant, but whether in the presence of the plaintiffs or their pleader and after hearing what they had to say in the matter does not appear, he rescinded it. Apparently his ground for doing so was that in consequence of the previous judgment which had been given in the case, the summonses that had been issued for the attendance of the witnesses were of no avail whatever, and it was the duty of the plaintiff after the order of the 3rd of February to have obtained fresh summonses.

I am not sure that he is right in that view; indeed I am rather inclined to think that it was not necessary that all the expense and trouble of obtaining and serving fresh summonses should be incurred by the plaintiff. But whether it was a good reason or not, it does not appear to me to be shown that this rescinding order was regularly made. And there being a previous order which was regularly made under Section 146, and which the Moonsiff clearly had power to make, it was incumbent on the defendant to show that it was regularly and properly rescinded. If it was not, then the order first made stands good, and the Moonsiff had no power to decide the case on the 29th, when all the evidence which the plaintiff was entitled to produce had not been produced, and was not before him. Therefore, there was a defect in the procedure and a defect in law which might most materially have affected the decision of the case on the merits. For that reason I think the decree which the Moonsiff passed, and the decree of the Court confirming it ought to be reversed.

The other objection taken was that the decree of May 1872 in a suit against a ryot for rent was improperly rejected. That decree was admissible in evidence, but unless it was followed up by evidence that it had been executed, or that the defendant against whom it was obtained had paid the money and satisfied the decree, it would be quite worthless. It is not shown to us that any offer was made on the part of the plaintiff

to give such evidence, or that any proceedings in the execution of that decree were tendered to the Moonsiff. We cannot assume that there were such proceedings. Without them the decree ought not to have varied the decision of the case; and for that reason the rejection of it is not a ground for a special appeal. But on the other ground, the decrees of both the Lower Courts must be reversed, and the suit must be remanded for retrial. The costs will abide the result.

Glover, J.—I am of the same opinion.

The 24th April 1873.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Special Appeal—Suit against Law-agent—Act XI of 1865 s. 6—Act XXIII of 1861 s. 27.

Case No. 757 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 12th February 1872, reversing a decision of the Moonsiff of Pauchpookooreah, dated the 29th April 1871.

Joogul Kishore Roy (Plaintiff) *Appellant,*

versus

Rughoo Nath Seal (Defendant) *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Chunder Madhub Ghose and Sreenath Banerjee for Respondent.

In a suit to recover the balance, unaccounted for, of plaintiff's money in the hands of defendant who had been employed as a law agent on a salary to conduct and look after plaintiff's law suits, and to receive and disburse moneys connected with such law suits, it was held that the case might be brought under the terms "claim for money due under a contract" (Act XI of 1865 s. 6), and that therefore under Act XXIII of 1861 s. 27 a special appeal would not lie.

Jackson, J.—THE suit out of which this special appeal arises was a suit to recover Rs. 428, being the plaintiff's money in the hands of the defendant unaccounted for. It seems to be admitted that plaintiff retained and employed the defendant as a mookhtear or law agent, to conduct and look after his law suits and to receive and disburse moneys on his account connected with such law suits, the defendant receiving a monthly salary of Rs. 2. The service extended over something less than a year and a half, viz., from 15th Falgun 1272 to 30th Srabun

1274, and the money which passed through the defendant's hands during that time from the plaintiff amounted to Rs. 2,391, out of which according to the plaintiff's own statement, the sum of Rs. 1,927 was accounted for over and above the defendant's wages, and the suit was for the balance.

In the opinion of the Moonsiff who tried the suit, the defendant succeeded in accounting for a larger sum than was admitted by plaintiff and the balance was in his judgment reduced to Rs. 310.

On appeal, the Subordinate Judge, Mr. Hutchinson, was of opinion that according to the nikas, that is, the defendant's statement of accounts, the sum of Rs. 2,273 "was used" in various ways on behalf of the plaintiff, "and though a portion of the money as bribes to the Court amlah was not lawfully spent, if really so spent, yet it was spent by the plaintiff and therefore the onus lies with the plaintiff, and he must show item by item the different sums amounting to Rs. 310-10-5 which he did not authorize the defendant to spend on his account." He then goes on to add: "In a proceeding held on the 10th instant, I gave the plaintiff's vakeel an opportunity to examine the defendant's nikas and to prove the items of unauthorized expenditure amounting to Rs. 310-10-5. The vakeel has not been able to show this," and thereupon he reversed the judgment of the Court below.

It seems to us not surprising that plaintiff has preferred a special appeal, but the respondent has taken a preliminary objection that under Section 27 Act XXIII of 1861 an appeal will not lie. The special appellant replies to this objection by saying that the case does not fall within the terms of Section 6 Act XI of 1865. We feel bound to say that in our opinion the words of that Section are sufficiently wide to include, and they do include, such a suit as the present. They include "claims for money due on bond or other contract." It was admitted by the special appellant that the word "contract" is not restricted to express contracts, but refers also to implied contracts. Assuming the concessions made on both sides, it appears that the defendant was the servant of the plaintiff, and in consideration of the wages he received he was bound to attend to his master's interests, and to disburse the moneys which he received from his master according to that master's direction, that is, it seems to us, to account for such moneys and to make good any balance that might remain in his hands. It is also possible to include this

claim under the term "damage," because the plaintiff might claim the amount for which he brought this suit as damages by reason of the wrong done by the defendant in not acting fully up to his instructions. At any rate, the suit might be brought under the terms "claim for money due under a contract." That being so, it seems that we have no power to entertain this appeal and disturb the judgment of the Lower Appellate Court, however erroneous or unreasonable it might appear. But we think it right to add one word as to the reasons for which we think the plaintiff in this case is not entitled to the sympathy of the Court. The defendant was employed as his law agent. This implies the possession by defendant of certain qualifications. Knowledge of law, habits of business and trustworthiness, and it appears that within the course of eighteen months money belonging to the plaintiff to the amount of Rs. 2,300 passed through the hands of the defendant, and for this combined position of trust and competency, the defendant was supposed to be remunerated by the salary of Rs. 2 per mensem. If in this state of things the plaintiff with his eyes open voluntarily runs the risk of placing money in the hands of the defendant without taking security from him, or otherwise assuring himself of his honesty, he can hardly expect the Court to feel much for him when the defendant is found to betray his trust. As we have said, the Court has little sympathy for the plaintiff in the present case, and under the circumstances we are less unwilling to dismiss this special appeal, but without costs.

The 24th April 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Execution—Limitation—Act XXIII of 1861 s. 11.

Case No. 755 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 7th February 1872, reversing a decision of the Moonsiff of Seetakoond, dated the 30th September 1871.

Najabut Ali Chowdhry (Plaintiff) *Appellant,*

versus

Busseeroollah Chowdhry and others
(Defendants) *Respondents.*

Baboo Nullit Chunder Sen for Appellant.

Baboo Aukhil Chunder Sen for
Respondents.

In a suit for possession and declaration of title in respect of property claimed by plaintiff under a wuseutnamah from his father, the alleged sole proprietor, which property had been sold in execution of a decree, plaintiff's ground of action was that execution had been fraudulently taken out, during his minority, of a decree barred by limitation:

Held that the question ought to have been raised in the Court executing the decree, and not in a separate suit; the latter course being contrary to Act XXIII of 1861 s. 11.

Jackson, J.—It seems to us that it is impossible that the plaintiff can succeed in this case. He sued to recover possession of one talook, and to have a declaration of his right to possession in certain other talooks alleging himself to be entitled to all this property in the capacity of *wusee* under a wuseutnamah made by one Nusrut Ali who was the sole owner of the property in question. It appears that the plaintiff's father Nusrut was one of two brothers, Nusrut Ali and Mozuffur Ali, and that the plaintiff himself had one brother named Yar Ali, who, married and lived at some distant place, and is not before the Court. The plaintiff suppressed all mention of his uncle Mozuffur's interest in the property, and in order to account for his doing so, he as representative of his father set up the wuseutnamah excluding his own brother Yar Ali, who, as stated above, had married and settled elsewhere. It appears that there had been a decree against Nusrut and Mozuffur obtained by the defendant Busseeroollah, who executed this decree and procured the sale of the property, and himself purchased at the sale. The plaintiff's story was that the execution of this decree had been barred by limitation, but that the decree-holder fraudulently took out execution during the minority of himself and his brother, and so caused the sale of the property. (It is admitted that the money due under the decree has never been paid otherwise than by the sale of the property). The Moonsiff who tried the case found on the issues stated in favor of the plaintiff, and gave him a decree for one-half of the property reserving the brother's share.

On appeal, the Subordinate Judge was of opinion that the wuseutnamah was not proved, and considering that the plaintiff's suit was based entirely on his title under the wuseutnamah thought it unnecessary to go into the other questions raised, and dismissed the suit. The plaintiff comes up

here in special appeal and contends that, even supposing that the wuseutnamah is not made out, yet he was as son of Nusrut, at all all events entitled to some share in the property; that the Moonsiff having been of opinion that the execution was barred and the proceedings consequently fraudulent, he was entitled to the judgment of the Lower Appellate Court on that point; and unless that Court came to a contrary conclusion, he was entitled to a decree for the share coming to him. We are inclined to think that in so far as the plaintiff sought to recover possession of the property to which he was entitled as the representative of his father, supposing that the facts otherwise entitled him to a decree, he might have recovered notwithstanding the failure of proof of the wuseutnamah, because the effect of that document would only be to entitle him to the whole of his father's share instead of one-half; but we are also of opinion that even making that concession in favor of the plaintiff, he is not much advanced in the object of the suit. We are referred to a case reported in 13 Weekly Reporter, page 273, Golam Asgur vs. Luckhee Monee Debee and others, in which it was held by a Division Bench, I myself being a member of the Court, that the circumstance of the execution of a decree under which a sale had taken place being barred by lapse of time invalidated the sale which took place under that execution. We entirely adhere to the opinion expressed in that case, but there is this important difference between that case and the present, that in that case apparently, — and we cannot conceive how judgment could have been given in any other state of things — the fact of the execution being barred was determined by the Court executing the decree or the Court hearing an appeal from the order of that Court, that is to say, the question must have been raised in a Court which was competent to determine such question under Section 11 Act XXIII of 1861, viz. the Court executing the decree, and not in a separate suit; whereas in the present case, the plaintiff brings the suit for the purpose of having it determined that the execution was barred, although the contrary must have been held by the Court which was executing the decree. This we think would be directly contrary to the express intention of the Legislature in Section 11. It is not necessary in this view of the case to advert to the other circumstances which render the plaintiff's claim liable to dismissal.

The charge of fraud against the decree-

holder was merely that he was executing his own decree which was barred by limitation to recover his own money, and no other circumstance has been alleged or proved to support the allegation of fraud. In this view of the case, the special appeal is dismissed with costs.

The 25th April 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Contract—Promissory Note—Cause of Action—Jurisdiction.

Case No. 926 of 1872.

Special Appeal from a decision passed by the Judge of Dacca, dated the 22nd March 1872, reversing a decision of the Sudder Moonsiff of that district, dated the 15th June 1871.

F. M. Proby (Plaintiff) Appellant,

versus

R. C. Bell, executor of the estate of A. D. Dunne (Defendant) Respondent.

Baboo Doorga Mohun Doss for Appellant.

Mr. Fergusson for Respondent.

Case.—Where a plaint set forth that the late D gave plaintiff a note written in Calcutta and addressed to C, asking C to pay plaintiff Rs. 650, and plaintiff sued D (resident at the time in Mymensingh) on the allegation that the money had not been paid, the Moonsiff of Dacca considering, upon the allegations made, and having regard to Act VIII of 1859 s. 139, that the suit was brought, not upon the promissory note, but upon the original cause of action, viz., a contract made in Dacca for the sale of land (in Assam), and finding that money was due in Dacca, considered himself to have jurisdiction, and tried the suit. In appeal, reversed the decision on the ground that the Moonsiff had no jurisdiction:

Held that the Moonsiff was warranted in trying the case upon the original cause of action, and that in that view he had jurisdiction.

Markby, J.—We think that the judgment of the Court below must be reversed. It is quite clear that the Moonsiff had jurisdiction in the view which he took to try this suit. If the suit had remained as it was originally brought, and as the Judge seems still to consider it as a suit upon the promissory note, in all probability, the Moonsiff of Dacca had no jurisdiction. But the Moonsiff, I think, very distinctly says that he considers that upon the allegations and statements made by the plaintiff, having

regard to the provisions of Section 139 Act VIII of 1859, he has a right to consider this as a suit brought, not upon the promissory note, but upon the original cause of action, namely, the contract for the sale of land made in Dacca; and he finds, and it is not disputed, that that contract was made in Dacca, and he also finds upon the evidence that the money was due at Dacca. If the Moonsiff was right in so considering this suit, there is no doubt whatever that he had jurisdiction to try it. Therefore, the only question which we have to determine in this case is whether or not the Moonsiff was at liberty so to consider this suit. Now there is no doubt that, taking the plaintiff's cause of action in this way is to some extent a departure from his plaint, but I do not think that it is a departure wider than that allowed in the case of *Joseph v. Solano*,* reported in the 9th Bengal Law Reports, page 441. The question is discussed by the Chief Justice in his judgment, page 453, and he points out the course taken in that case which is very similar to the course taken by the Moonsiff in this case, and is one which is warranted by the decision of the Privy Council there referred to. It seems to me, therefore, that the Moonsiff was warranted in trying this suit upon the original cause of action, namely, the contract made in Dacca, and in that view he had jurisdiction.

The case must, therefore, be remanded to the Judge to dispose of the appeal.

Birch, J.—I concur.

The 26th April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and Hon'ble F. A. Glover, *Judge*.

Resumption—Right of Settlement—Relation of Landlord and Tenant.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 15th January 1872, reversing a decision of the Moonsiff of that district, dated the 15th June 1871.

Mohesh Chunder Bhattacharjee (Plaintiff)
Appellant,

versus

Romanath Dutt and others (Defendants)
Respondents.

Baboo Anund Chunder Ghossal and Taruck Nath Dutt for Appellant.

Baboo Nil Madhub Sen for Respondents.

M and his brothers held a tenure of 10 beegahs, &c., as lakheraj. The zemindar sued for resumption of this land and obtained a decree for 3 beegahs, &c. After this M and his brothers sold the whole tenure as lakheraj to plaintiff and took a lease from him as ryots. Subsequently the zemindar took out execution of the decree he had obtained for costs, and sold M and his brothers' rights and interests in the 3 beegahs, &c., in the land which had been declared mâl. These rights were bought by R and P. After this plaintiff sued M and his heirs for rents. Defendants objected that 3 beegahs, &c., had been taken out of their possession by R and P, who, on being made defendants, denied plaintiff's right to rent which they had paid to the Zemindar:

Held that the utmost right that M and his brothers had in the resumed land was the right to settlement, which could not be transferred without the consent of the zemindar, and that as no relation of landlord and tenant existed between plaintiff and the execution purchasers, he could not succeed in this suit, and they ought not to have been made defendants.

Glover, J.—THE facts of this case are a little complicated, and it will be as well to detail them.

Magun and his four brothers held a tenure (alleged to be lakheraj) of 10 beegahs 17 cottahs.

The zemindar brought a suit for resumption of this land as part of his mâl estate and succeeded in getting 3 beegahs 2 cottahs declared liable to pay rent.

After this decree was obtained, Magun and his brothers sold the whole tenure of 10 beegahs 17 cottahs as lakheraj to the plaintiff (10th Assin 1273), and then took a lease of the land as ryots from the purchaser. Their kubooleut is dated Srabun 1274, for five years at a yearly rent of Rs. 27-14-17.

Subsequently (in 1275) the zemindar took out execution of the decree he had obtained for costs in the resumption case, and in execution attached and sold Magun and his brothers' rights and interests in the 3 beegahs 2 cottahs of land which had been declared to be mâl.

These rights were bought by Romanath and Pitambur on the 20th Kartick 1275.

After this, the plaintiff sued Magun and his heirs under the kubooleut for the rents of 1275-77. The defendants objected that part of the land, viz. 3 beegahs 2 cottahs, had been taken out of their possession by Romanath and Pitambur, and they prayed the Court to make these parties defendants. This was done as the plaintiff admitted their possession. Romanath and Pitambur denied plaintiff's right to any rent from them; there was no relation of landlord and tenant between

* 18 W. R., 424.

them, nor had they ever agreed to pay him rent. They paid rent to the zemindar.

The Moonsiff held these parties liable for the land in their possession, but the Judge reversed that order.

It is contended in this special appeal that Magun and his brothers sold all their rights to the plaintiff, and that these included their right to hold the 3 beegahs 2 cottahs on payment of rent to the zemindar, and the plaintiffs are willing to pay rent to him.

This appears to us a fallacy. The utmost right that Magun and his brothers had in these 3 beegahs 2 cottahs after the resumption suit was the right to settlement. This was a personal right which could not have been transferred to a third party except with the consent of the zemindar. Moreover, the deed of sale executed by Magun did not pass any māl land at all: it only conveyed lakheraj land, and at the time the sale was made the only lakheraj land in the vendor's possession was 6 beegahs 18 cottahs. The giving of this deed of sale so soon after the resumption decree appears to have been a trick on the part of Magun to get rid of the effect of the order, declaring 3 beegahs 2 cottahs of his land to be liable pay to rent.

But in any case, the plaintiff cannot succeed in this suit. He claims rent on a kubooleut executed by Magun, and there has been neither agreement nor contract on the part of the defendants Romanath and Pitambur to pay him rent. No relation of landlord and tenant exists between the parties, and the execution purchasers ought not to have been made defendants.

They hold the land as purchasers of Magun's right to a settlement with the zemindar at a sale held with the zemindar's consent, and the only person to whom they have attorned as tenants is the zemindar. They cannot in this suit be made liable to pay rent to the plaintiff.

We confirm the decision of the Judge, and dismiss the special appeal with costs.

The 29th April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble C. Pontifex, Judge.

Small Cause Courts—Act IX of 1850 ss. 58, 88—Jurisdiction—Sale of Moveable Property in execution of Decree—Huts—Goods and Chattels.

Kallypersaud Sing, *Plaintiff*,

versus

Hoolaschund, *Defendant*.

Mr. Apcar for the Plaintiff.

Huts are not goods and chattels, and cannot be taken in execution of a decree of the Court of Small Causes under s. 58 Act IX of 1850.

THIS was a reference by the first Judge of the Court of Small Causes at Calcutta for the opinion of the High Court under Section 7 Act XXVI of 1864. The reference was as follows:—

The plaintiff interpleaded under Section 88 of Act IX of 1850 for two tiled huts, valued at Rs. 1,000, which had been seized by the defendant (judgment-creditor in a previous suit), and which the plaintiff claimed as goods and chattels belonging to himself.

The huts were proved to be of the following construction:—The posts were very large, made of saul wood: the ceiling is made of planks covered with mortar and chunam; the floor of the second story of mortar like houses, and the walls of split bamboos and gurren posts covered with mud; there are wooden steps nailed on to the pillars: the ground floor is made of bricks covered with tiles.

I held that these huts were not moveable without change of form, and that they were clearly not moveable property under the Act for the Regulation of Mofussil Small Cause Courts, and the Full Bench decision in *Natu Miah vs. Nand Rancee* (8 Bengal Law Reports, page 504).*

The Presidency Small Cause Courts, in reference to English law use the phrase 'goods and chattels' in lieu of the phrase 'moveable property'; but I apprehend the two terms are convertible. English law considers as goods and chattels whatever amounts not to freehold (Stephen, page 286), and things real consist of things substantial and immoveable and of the rights and profits arising out of these (*Ibid*, page 172). Immoveability is consequently one essential characteristic of realty; and moveability one essential characteristic of goods and chattels: and the definition of things immoveable given in the Full Bench decision above referred to will apply to goods and chattels also. It is true that the term goods may be considered to refer to such things as have no concern with realty, and are mere moveables and are

* 17 W. R., 309.

often described as chattels personal: and the term chattels to chattels real or estates in lands and tenements not amounting to freehold. But these latter are scarcely seizable by a bailiff, and the term in this sense would certainly not include the huts which are the subject of the present seizure.

On these grounds, I have held that the huts claimed are not goods and chattels, and are consequently not the proper subject of a claim under Section 88 of Act IX of 1850, but should be made the subject of an action of trespass for a seizure not justifiable under the terms of my warrant.

This decision is given subject to the opinion of the High Court on two points, viz. :—

1st.—Whether I am right in considering that the tiled huts claimed are not goods and chattels?

2nd.—Whether, if I am, I am also right in dismissing the plaintiff's claim under Section 88?

I submit the first question myself, as the practice of the Court has for years previous to my tenure of this office been to treat tiled huts as goods and chattels, though it seems from Mr. Temple's work on the practice of the Court that they were not always treated as such.

The second question I submit at the request of the plaintiff's counsel.

It is to be understood that, notwithstanding the dismissal of the plaintiff's claim, the bailiff will of course, should the High Court concur in my view of the legal character of tiled huts in question, at once, as a matter of course, release them.

The judgment of the High Court was delivered as follows by—

Couch, C.J.—The first question put to us by the learned Judge of the Small Cause Court is “whether I am right in considering that the tiled huts claimed are not goods and chattels.” He does not say “within the meaning of Section 58 of Act IX of 1850,” but that is what he must have intended and the question which we should answer.

What is meant by goods and chattels by Section 58 appears from the subsequent Sections. It is one of a series of Sections relating to the execution of an order of the Court, and we find it said in Section 69 that “every bailiff executing any process of execution issuing out of the said Court against the goods of any person may by virtue thereof seize and take any of the goods of such person (excepting the neces-

sary wearing apparel and bedding of such person or his family, and the tools and implements of his trade), and may also seize and take any money or bank-notes, and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money belonging to any such person against whom any execution shall have issued as aforesaid.” The word “chattels” does not occur there. I think this shows that in Section 58 chattels was used as synonymous with goods, and not as having a more extensive meaning. Then in Section 73, the previous Sections containing provisions in regard to the sale of the property taken in execution, it is said “until such sale the goods shall be deposited by the bailiff by whom they were taken in some fit place, or they may remain in the custody of a fit person approved by the Judges to be put in possession by the bailiff.” That is a provision consistent with goods and moveables being taken in execution, but not with a hut or house being taken. Then Section 80 provides for what is called the goods and chattels of the party being discharged and set at liberty,—which, I take it, means being restored to the owner or freed from the execution. All these provisions seem to show that what was intended to be taken in execution of the order of the Small Cause Court were goods and chattels, or what are moveables, and not what in English law are known as chattels real. This construction of Section 58 is supported by the opinion of all the Judges in the case in 8 Bengal Law Reports, page 508.* The ground upon which Mr. Justice Macpherson put his judgment shows that the huts are not goods and chattels equally with the opinion of myself and the two Judges who concurred with me. Mr. Justice Macpherson said he considered that a hut was a house, and certainly a house cannot be properly described as goods and chattels. I think, therefore, that what have been described in this case by the Judge of the Small Cause Court are not goods and chattels that might be taken in execution under Section 58.

The second question submitted to us is, whether if they are not goods and chattels, the learned Judge was right in dismissing the plaintiff's claim under Section 88.

Now Section 88 provides that “if a claim is made to or in respect of any goods or chattels taken in execution under the

* 17 W. R., 311.

process of any Court," &c. If these are not goods and chattels taken in execution under the process of the Court, they do not come within the words of that Section. What it was intended for is that when the bailiff had, in execution of the order of the Small Cause Court, seized property which, if it were the property of the defendant in the suit, might be taken in execution, and another person had put in a claim to it, the claim should be summarily dealt with by the Small Cause Court. But here the bailiff has taken in execution that which, even if it were the property of the debtor, he would not be at liberty to take; and though it may seem hard that the claimant should be obliged to resort to a suit in order to establish his right and to prevent his property being sold, that is the proper remedy. The bailiff, by seizing what the warrant of the Small Cause Court could not authorize him to seize, has been guilty of an illegal act, trespass for which he is liable to be sued, and for which he may have to pay such damages as the owner of the huts may have suffered in consequence. Seeing what is stated in the case by the Judge of the Small Cause Court, he will probably not suffer any serious injury. An order will be made which will set matters right. I think we must answer both the questions which have been put to us as the learned Judge has decided, that huts are not goods and chattels within the meaning of the Act and that the Judge was right in dismissing the claim.

The 1st May 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Act VIII (B.C.), 1869—Postponement of Execution-sale—Jurisdiction—High Court's Act s. 15.

In the matter of
J. G. Bagram, *Petitioner.*

Mr. P. M. Gasper for Petitioner.

Where, in a case under Act VIII (B.C.) of 1869, a Moonsiff, on a claim being preferred to property attached in execution, postponed the sale of it without taking security, or having the amount of the decree deposited :

Held that his proceeding, though erroneous, was in a case in which he had and exercised jurisdiction, and that his decision ought not to be set aside under the 15th section of the High Court's Act.

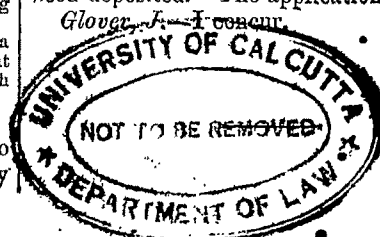
Couch, C.J.—In this case, according to the statement of the petitioner, the property

was attached in execution of a decree under Act VIII of 1869 (B.C.) and a claim was preferred to it. The Moonsiff received the claim and has, after an investigation of it, ordered that the claim be admitted, and the property be released, and the claimant's pleader's fees be paid by the decree-holder.

It is now objected that the decision of the Moonsiff was without jurisdiction on the ground that the amount of the decree was not deposited in Court, or security given for it.

The jurisdiction of the Moonsiff is given by Section 246 of Act VIII of 1859 which authorizes the Court, when a claim is preferred to attached property, to investigate it with the like powers as if the claimant had been originally made a defendant to the suit. Section 247 enables the Court, if it appears necessary, to postpone the sale for the purpose of making the investigation. In cases under Act VIII of 1869 (B.C.) the power is subject to a further qualification; the Court is not to postpone the sale unless the amount of the decree is deposited or security given for it. But the jurisdiction to investigate the claim does not depend upon that. The jurisdiction is founded upon a claim being made. The Moonsiff cannot deal with the question of postponing the sale until he has acquired jurisdiction, and is proceeding to investigate the claim by virtue of it; and his postponing the sale without taking security, or having the amount of the decree deposited, is not an act either without jurisdiction over the subject-matter or in the proceeding, or in excess of his jurisdiction. It is an erroneous proceeding in a case in which he has jurisdiction, and is exercising it. He may have acted erroneously in this case in postponing the sale without requiring the deposit, or the security, but his decision allowing the claim is a decision within his jurisdiction. I do not think that we ought under Section XV of the High Court's Act to interfere and set the decision aside, because in the course of his proceeding he has erroneously postponed the sale. The result shows that the sale ought not to be made, nor would the decree-holder be entitled to receive the money which it is contended ought to have been deposited. The application is rejected.

Glover, J.—I concur.



The 1st May 1873

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Act VIII of 1859 ss. 92 & 246—Claim—Injunction—Procedure.

Case No. 68 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Subordinate Judge of Moorshedabad, dated the 24th February 1873.

Roy Luchmeeput Singh Bahadoor
(Defendant) *Appellant*,

versus

The Secretary of State for India (Plaintiff)
Respondent.

Mr. R. T. Allan and Baboos Sreenath Doss and Rash Beharee Ghose for
Appellant.

The Advocate-General for Respondent.

Certain immoveable property having been attached in execution of a decree by L against N, a claim was put in by S, which being refused, S, as provided by Act VIII of 1859 s. 246, immediately brought a suit to establish his right. In this suit an injunction was granted by the Subordinate Judge under s. 92 for the purpose of stopping the execution proceedings in respect of the said property :

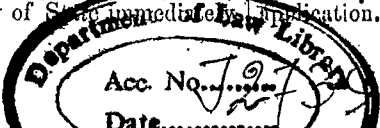
Held that the provisions of s. 92 were not applicable to a case like the present, and did not justify the issue of the injunction; and that S's proper course would have been to present a further petition in the execution case of L v. N. representing that he had brought a suit, and praying for postponement of the sale.

Held, further, that as S's claim was right and reasonable in itself, though the course he had taken was technically erroneous, his application should be dealt with as if it were made in the execution proceedings.

Jackson, J.—THIS an appeal against an order of Baboo Brojendro Coomar Seal, Officiating Subordinate Judge of Moorshedabad, granting an injunction under Section 92 of the Code of Civil Procedure for the purpose of stopping the execution proceedings in respect of certain properties specified which had been attached with a view to sale in execution of a decree obtained by Roy Luchmeeput Singh Bahadoor against the Nawab Nazim of Moorshedabad. Upon the attachment of the property in question, a claim had been put forward by the Secretary of State in Council as entitled, in succession to the East India Company, to the immoveable property in question. That claim was refused, and as provided by Section 246, the Secretary of State immediately

brought a suit to establish his right, and it was in this suit that the order now complained of was made.

It appears to us that regard being had to the terms of Section 92 and to the place which that Section occupies in the Code of Civil Procedure, its provisions are not applicable to a case like the present, and do not justify the issue of this injunction. The suit, although the Nawab Nazim has since been made a party under Section 63, was against Roy Luchmeeput Singh, and the injunction was specifically directed against him. It cannot, we think, be said that the property in dispute was in danger of being wasted, damaged, or alienated by this defendant, nor has the property been, or is it at present, in any sense in his possession. That which the plaintiff apprehended, and which was in fact likely to occur, was that the defendant should in executing his own decree set the Court in motion and cause the right title and interest of the Nawab Nazim to be sold and conveyed to some other person. If such sale had taken place, and if the property had gone into the hands of some person who was likely to waste, damage, or alienate, such injunction might have been properly and reasonably applied for. The course which has been taken in the present instance appears to us too nearly to resemble the action of the Court of equity upon proceedings at common law in England to be applicable to proceedings of our Mofussil Courts, and we think therefore that the plaintiff entirely misconceived the course which he ought to have taken in applying for this injunction. This, however, it appears to us, is only a matter of procedure. The parties before us in the present case are the very parties who were before the Court in the execution claim and proceedings; and as in our opinion upon the state of facts disclosed in this case, it would not have been proper for the Court to proceed to sell the property in dispute, we do not think that that which is in itself right and reasonable should be prejudiced because the parties have taken a technically erroneous course. We cannot doubt that, if the Secretary of State had presented a further petition in Court in the execution case of Roy Luchmeeput Singh, representing that, upon the rejection of his claim, he has now brought a suit to establish his right, and praying that the sale should be postponed, the property continuing under attachment, the Court would and ought to have complied with his application. It appears to us, therefore,



that we should direct the present injunction to be dissolved, but at the same time we should order that the application should be dealt with as if it were made in the execution proceedings, and that an order should be entered on those proceedings staying the sale pending the suit which has now been commenced, provided always that it should be competent to the decree-holder in case of any undue delay in prosecuting the suit to make a further application to the Court for an immediate sale. The order of the Court below being varied in this way, the case appears to us to be one in which we should make no order as to costs.

The 3rd May 1873.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Act XXV of 1861 s. 318—Act XIV of 1859 s. 15.

In the matter of

Chytun Chunder Roy, *Petitioner,*

versus

Brojo Kant Roy and another, *Opposite Party.*

Baboo Mohinee Mohun Roy for *Petitioner.*

Baboo Shushee Bhoosun Dutt
for *Opposite Party.*

An award under s. 318 of the Criminal Procedure Code (Act XXV of 1861) is no bar to a possessory action under Act XIV of 1859 s. 15.

Kemp, J.—We think that this rule must be discharged. The question before us is whether the fact of an award having been passed by a Magistrate under Section 318 of the Code of Criminal Procedure maintaining a party in possession is any bar to a possessory action under the provisions of Section 15 Act XIV of 1859. Now the facts of this case are somewhat peculiar. Prior to the Magistrate's award, the opposite party had instituted this possessory action under Section 15; in that suit he was of course obliged to admit that he had been dispossessed otherwise than by due course of law by the petitioner, and the petitioner before us taking advantage of this fact appears to have brought to the notice of the Magistrate the plaint in the Section 15 case in which the plaintiff in that case, the opposite party before us, was obliged to admit

that he had been dispossessed otherwise than by due course of law, and the Magistrate finding an admission on the part of the opposite party that he was not in possession, retained the petitioner in possession without looking into any other question. Now, the object of Section 15 Act XIV of 1859 is not to maintain, but to restore a party to possession; the object of Section 318 being to maintain a party in possession temporarily at least, whether that possession is a wrongful one or not, while Section 15 is to restore to possession parties dispossessed otherwise than by due course of law; and an award under Section 318 of the Criminal Procedure Code is, therefore, no bar to a possessory action under Section 15 Act XIV of 1859. We, therefore, think that this rule must be discharged with costs.

The 5th May 1873.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Surety Bond—Guarantor's Liability.

Case No. 809 of 1872.

Special Appeal from a decision passed by the Judge of Moorsheedabad, dated the 16th April 1872, reversing a decision of the Subordinate Judge of that District, dated the 5th August 1871.

Messrs. James Lyall & Co. (Plaintiffs)
Appellants,

versus

Amorabutty Dossee and others (Defendants)
Respondents.

The Advocate-General and *Baboo Kalee Mohun Doss* for *Appellants.*

Mr. C. Jackson and *Baboos Sreenath Doss, Mohinee Mohun Roy, and Rash Beharee Ghose* for *Respondents.*

Where a party engaged to be surety for a gomashta and to make good all defalcations proved to have been made by him, the engagement was held to refer to defalcations shown to have been made by the gomashta during the period of the guarantor's life, and not to apply to a time after the guarantor's death, when all power of advising or controlling the gomashta had ceased.

Glover, J.—THE Judge of the Lower Appellate Court dismissed the plaintiff's suit on the ground that the conditions under which Ram Koomar entered into the surety-bond had not been fulfilled, and that the

guarantor was therefore discharged. The Judge also thought, though this is not given as a reason for deciding, that the engagement of Ram Koomar ceased at his death, and that the suit had been improperly brought by the firm instead of by the individual in whose favor the security bond was made.

The two last conditions named by the Judge were admittedly impossible ones at the time the suit was brought, the guarantor having been for some time dead. The first was that Ram Koomar was to be liable only after the gomashita, the guarantee, had given in writing an acknowledgment of his debt to the plaintiffs.

The special appellants contend in the first place that the Judge has misconstrued the security bond in this particular, and that there was nothing in it which made a written acknowledgment of a debt on the part of the gomashita a condition precedent to making the property hypothecated by the guarantor liable.

I have read the security bond very carefully, but cannot find in it any such stipulation as the Judge mentions. The guarantor binds himself to make good any defalcation after the accounts are made up, but there is nothing about it being necessary for the gomashita to give a written acknowledgment of the deficit before his surety is to be called upon to pay. The other two stipulations are now, as the Judge admits, impossible of execution as they depended on the life of the guarantor.

Taken this view of the Judge's decision, I was at first doubtful whether the case ought not to be remanded, but on further consideration I think not, the Judge having sufficiently expressed his opinion on the points of law which still remain to be decided.

The first objection that the suit was improperly brought by the firm, instead of by the individual to whom the guarantee was given, is, I think, untenable. The security was undoubtedly given to the firm and for purposes connected with the firm, and with which Mr. Lyall as an individual had nothing to do. There was really no non-joinder of parties, for all the partners interested were brought before the Court. In any case, however, the objection is certainly not one that this Court would be inclined to entertain in special appeal, inasmuch as no question of jurisdiction arises, and the defendant has in no way been prejudiced, nor have the merits of the case been touched.

On the other point, the Judge, I think, is wrong in laying down as a general proposition of law that liability ceases on the death of a surety. In the generality of cases it would not cease, the contract made by the guarantor continuing in force and binding his representatives until the engagement was concluded, or other arrangements made. But the present case is altogether different. The intention of the parties seems clear enough. Ram Koomar engaged to be surety for Huree Churn, and to make good all defalcations proved to have been made by him; but this of course referred to defalcations shown to have been made by Huree Churn during the period of the guarantor's life. Ram Koomar might enter into an arrangement of this sort, knowing that he had a certain influence over his guarantee, and could either by supervision or advice make any defalcation impossible. He might be perfectly willing to bind himself to this extent, and even to pledge property to make good any loss that the gomashita's employers might sustain through the misfeasance of their servant, but unless there were the clearest possible indication in the surety bond that Ram Koomar meant to go further than this, I should never suppose that the engagement was intended to apply to a time after the guarantor's death, when all power of advising and controlling Huree Churn had ceased.

Now, Ram Koomar died in 1271 B.S., corresponding to 1864 A.D., and the deficit is alleged to have taken place in the accounts of 1870 A.D., or six years after the guarantor's death.

It appears to me that, although Ram Koomar's estate might have been made liable for any deficit in Huree Churn's accounts up to 1864 A.D., it cannot be bound for a defalcation that took place six years afterwards. If the wording of the security bond were clear on the point and the intention of the parties were undoubtedly shown, it would of course be different, but there is nothing that I can see in the bond that supports this contention. The words "I shall not be exonerated from this security bond so long as the gomashita remains in his appointment," must, I think, be construed as referring to a time before the guarantor's death.

The learned Advocate-General for the special appellants referred to Raj Koomar Ram Gopal Narain Singh v. Ram Dutt Chowdhry, 5 Ben., 264,* as showing

* 13 W. R., F. B., 82.

that lands set apart as security for the repayment of a debt were mortgaged. I do not see any analogy between the two cases. It may be that an engagement not to alienate certain lands until a certain fixed sum of money is repaid operates as a mortgage of those lands, but it is a different thing when the debt is only a possible contingency, something that may never happen.

I think, although I do not agree with the Judge, that the special appeal must be dismissed with costs.

Mitter, J.—I am of the same opinion. The very fact that some of the conditions of the security bond have become incapable of execution in consequence of the death of the surety clearly shows the intention of the parties.

The 5th May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Thak Map—Survey Map.

Case No. 789 of 1872.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 16th January 1872, modifying a decision of the Moonriff of Durbhangah, dated the 21st July 1871.

Mr. James Burn (Defendant) *Appellant,*

versus

Achumbit Roy and others (Plaintiffs)
Respondents.

Baboo Unnoda Pershad Banerjee for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

A survey map may be resorted to for assistance in considering the evidence of a *thak* map as to area and boundary.

Phear, J.—We think it is clear that the Judge of the Lower Appellate Court has made a mistake with respect to the application of the *thak* map. Both parties, no doubt, appeal to the *thak* map so far as it affords good substantial evidence, namely, evidence of the linear distances between the successive marking points (or *thaks*) of the boundary lines. The map by its nature does not pretend to be anything more as regards the

relative angular distances, or positions of the different points, than a sketch outline just sufficient to connect them and to indicate roughly their situations on the ground.

My learned brother has carefully compared the results of the *thak* map with the survey map; and there seems to be, no doubt, that each of them accurately represents the same area of land. There is this difference only between them that, if the *thak* map be closely followed with regard to angular distances as well as linear ones, it will have the effect of slightly shifting or displacing one of the cardinal points of the lines 61, 64.

It appears to us that the first Court was right in using the *thak* map in connection with the survey map. The Judge has brought about an error by ruling that the assistance of the survey map ought not to have been resorted to.

Under the circumstances of the case, we think that the right decree will be simply to reverse the decision of the Lower Appellate Court.

The appellant must have his costs in this Court and in the Lower Appellate Court.

The 5th May 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Rent Suit—Declaratory Decree—Act VIII (B.C.) of 1869—Jurisdiction.

Case No. 1202 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 28th May 1872, affirming a decision of the Moonriff of Pandooah, dated the 28th February 1872.

Anund Moyee Dossee (Plaintiff) *Appellant;*

versus

Raye Monce Dossee and others (Defendants)
Respondents.

Baboo Bipro Doss Modkerjee for Appellant.

Baboo Mohesh Chunder Chowdhry and Gopal Chunder Mookerjee for Respondents.

Plaintiff sued for a declaration that certain land was *mal*, as well as for assessment of rent thereon, and for arrears of rent at the rate assessed. The suit was dismissed, and an appeal was preferred when plaintiff who had elected to sue under the rent law VIII (B.C.) of

1869, abandoned the two last points in his claim, and asked merely for a declaratory decree:

Held that the Lower Appellate Court ought to have proceeded with that part of the case, and disposed of the appeal as to that only.

Markby, J.—IN this case it seems that the plaintiff had originally sued (1) for a declaration that certain land was mâl; (2) for the assessment of rent on it; and (3) for arrears of rent at the rate assessed. The first Court dismissed the suit altogether. On appeal, a question was raised whether the suit could lie, and in dealing with that the District Judge says:—"It is evident that a suit for the first portion of the plaintiff's demand, that is a declaratory decree, is cognizable only by the Civil Courts in their ordinary jurisdiction, and that the last is cognizable only under the rent law; jurisdiction over the second being somewhat doubtful. But the plaintiff has elected to sue under the rent law. He now wishes to abandon his claim on the two last points, and to ask merely for a declaratory decree that this land is mâl, but that this suit having been tried under the special jurisdiction created under Act VIII of 1869 I am unable to grant his request."

Now, without going into the general and more difficult question as to the position of the Civil Courts under Act VIII of 1869, B.C., we think that, when the claim of the plaintiff had been reduced to a simple claim for a declaration that the land is mâl, and therefore to a claim which, as the Judge says, was undoubtedly within the ordinary jurisdiction of the Civil Courts, he was at liberty, and that he ought, notwithstanding that the suit had been originally registered as a suit under Act VIII of 1869, to have proceeded with that part of the case, and to have disposed of the appeal as to that only.

The decision of the District Judge must, therefore, be set aside, and the case remanded to him, in order that he may determine whether or no that part of the plaintiff's suit which asks for a declaration that the land is mâl, and which the Moonsiff has dismissed, can be maintained.

The 6th May 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Distraîner—Landlord and Tenant—Act VIII (B.C.) 1869 ss. 82 & 102.

Case No. 1273 of 1872.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 27th June 1872, modifying a decision of the Moonsiff of that district, dated the 29th February 1872.

Huro Pershad Chuckerbutty (Plaintiff)
Appellant,

versus

Sreedam Chunder Chowdhry (Defendant)
Respondent.

Baboo Taruck Nath Dutt for Appellant.

No one for Respondent.

Where in a suit under Act VIII (B.C.) of 1869 s. 82 to contest the demand of the distrainer, a question as to area was raised merely as subordinate to the issue as to the amount of rent due, without any dispute as to the relationship of landlord and tenant, the case was held not to come within the provisions of s. 102.

Markby, J.—THE suit in this case as stated by the Lower Appellate Court, and we think correctly stated, was brought under Section 82 to contest the demand of the distrainer who had distrained the plaintiff's crops, and the damages were assessed at Rs. 46. It does not appear to us that any question of title either to land or to any interest in land was raised in this suit. The real dispute was as to the amount of rent due. The plaintiff alleged that the area of the land which was included in the defendant's tenure was greater than that which the defendant himself admitted; but there was no dispute whatever as to the relationship of landlord and tenant between the parties, and the issue which raises the question as to area does not raise any question of title between the parties, but merely raises the question of the area as subordinate to the other part of the issue, namely, what was the amount of rent due. The case therefore does not come within the provisions of Section 102, and the matter involved in the suit being less than one hundred rupees no appeal lies.

The appeal must, therefore, be rejected.

The 6th May 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Landlord and Tenant—Act VIII (B.C.) of 1869 ss. 82 & 102.

Case No. 1149 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 2nd May 1872, reversing a decision of the Moonisiff of Bistopore, dated the 9th March 1872.

Hurish Chunder Chuckerbutty (Defendant)
Appellant,

versus

Sreemutty Huree Bewah (Plaintiff)
Respondent.

Baboo Radhika Churn Mitter for Appellant.

Baboo Nil Madhub Sen for Respondent.

Where the question is as to the amount of rent, but not as to the right to vary the rent, the case does not come within the provisions of Act VIII (B.C.) of 1869, s. 102.

Markby J.—We have already discussed a case similar to this once before to-day.* We think that no appeal lies. The question in this suit was not as to the right to vary the rent, but as to what the amount of rent was. The case therefore does not come within the provisions of Section 102 Act VIII of 1869 B.C. The case which has been referred to and which was decided by Mr. Justice Kemp and Mr. Justice Glover is different. The question there was as to the right to vary the rent. The appeal is therefore rejected.

The respondent is entitled to his costs.

The 6th May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Declaratory Decree—Recusancy on Part of
Deputy Collector—High Court's Powers.*

Case No. 114 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Tirkoot, dated the 16th February 1872.

Rughoonundun Singh Bahadoor (Plaintiff)
Appellant;

versus

Mr. S. Cochrane, Agent of the Agra and
Masterman's Bank (Defendant) Respondent.

Mr. R. E. Twidale and Baboo Romesh
Chunder Mitter for Appellant.

The Advocate-General for Respondent.

If a decree of a Civil Court declares that plaintiff has a right to bring certain property to sale in a Deputy Collector's Court, and the Deputy Collector at the instigation of the defendant declines to proceed with the sale, his declining to do his duty does not give a fresh cause of action for the purpose of obtaining a second declaration, though it may be a good ground for asking the High Court to use its extraordinary powers to put the Deputy Collector right.

Phear, J.—It appears to us that we ought not to call upon the other side, because it seems plain that the statements in the plaint do not constitute a cause of action against the defendant. In substance the plaintiff alleges that in 1865 and in 1866, he obtained two decrees in the Deputy Collector's Court for arrears of rent; that in 1867, he was seeking to execute these decrees by the attachment and sale of the property which is the subject of the present suit, and which at that time, as far as we understand, although it previously belonged to his judgment-debtor, had, as regards a part of it at any rate, got into the hands of a third person.

At this stage of the proceedings, objections were made to the sale which the Deputy Collector thought good, and he accordingly put off the sale. "Upon this," the plaintiff says, your petitioner instituted a regular suit against the defendant for setting aside the aforesaid miscellaneous order, and for order to bring to sale the said share of six annas according to the terms of the kubooleut, and this Court agreeably to your petitioner's claim, passed a decision dated the 30th May 1868 ordering the sale of the property, and there being no appeal from this decision it became final."

It appears from a former part of the present plaint, which we have not read, that according to the contention of the plaintiff under the terms of the kubooleut by which the judgment-debtor held the property subject thereto, the property which is now in suit was made liable to pay the rent which might be in arrear on an assignment of the lease, and this is what we suppose is meant in this passage when the plaintiff says that he asked "for order to bring to sale the said share of six annas according to the terms of the kubooleut."

It does not appear very clear what precisely were the terms of the decree passed in plaintiff's favor on the 30th May 1868. Baboo Romesh Chunder Mitter for the plaintiff says that it must have been a decree declaring the plaintiff's right to bring the property to sale in the Collector's Court for the satisfaction of the decrees of 1865 and

* See previous case.

1866. This may have been so. But it seems to us also possible that it might be a decree ordering the sale of the property by the Civil Court itself for the purpose of discharging the lien which the plaintiff maintains he has upon the property under the terms of the kubooleut. However this may be, it was certainly treated as a decree which declared the plaintiff's right to have the property sold by the Deputy Collector. On the strength of it the plaintiff renewed the proceedings of execution in the Deputy Collector's Court, and the plaint goes on to say:—"On the property being lotted off for sale the second time, the defendant put forward his objection on misrepresentation of fact to the effect that, by the decision passed on Chumna Chowdhry and other's appeal to the High Court, the aforesaid decision" (*viz.* the decree of 30th May 1868) "has been reversed; thereupon the revenue officer having admitted the objection stopped the sale, and this order gave the cause of action for this suit." The prayer of the plaint is for an order of sale. In other words, when the plaintiff went down to the Collector's Court again with the decree of the 30th May 1868 in his hand, making an application for the sale of the property,—on objections being renewed in behalf of the defendant, the Deputy Collector again refused to sell, and upon this ground the plaintiff comes into Court to have, as it seems to us, precisely the same question tried over again between himself and the defendant, with regard to the same property, as the question which was tried and determined in the suit which ended in the decree of the 30th May 1868, namely, the question whether or not he had a right to have that property sold in the Deputy Collector's Court in execution of his decrees of 1865 and 1866.

Mr. Twidale and Baboo Romesh Chunder Mitter have both urged very earnestly that the second refusal of the revenue officer, on the instigation of the defendant, to allow the sale was a new ingredient in the case sufficient of itself to constitute a fresh cause of action against the defendant. It seems to us that it is not so. If the decree of the 30th May 1868 declared that the plaintiff had a right to bring the property to sale in the Deputy Collector's Court, it was the duty, no doubt, of the Deputy Collector to conform to that decree, and to take steps for proceeding with the sale of the property accordingly. If he did, at the instigation of the defendant, decline to do his duty, it did not, we think,

give a fresh cause of action for the purpose of obtaining a second declaration of right against the defendant, though it might be a very good ground for asking this Court by the exercise of its extraordinary powers to put the Deputy Collector right. If, on the other hand, the decree of the 30th May 1868 was a decree in the civil suit declaring the plaintiff's right of lien over the property and ordering it to be sold, that sale of course would take place in the Civil Court, and by the direction of the Civil Court itself; and consequently that decree could not be any authority for ordering the Deputy Collector to sell the property in execution of the decrees of 1865 and 1866. In short, the plaint discloses that the plaintiff has already got an effective decree of the Civil Court in his favor ordering a sale of this property, and it shows no reason which can serve to entitle him to have a second order of sale made.

It seems to us, therefore, on the whole, quite clear that the facts set out in the plaint do not constitute a cause of action against the defendant other than a cause which has been long ago determined. We think, therefore, that this appeal should be dismissed with costs.

The 7th May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Revenue Court's refusal to execute—Limitation—Right of Action—Form of Suit.

Case No. 115 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 16th February 1872.

Rajah Rughoonundun Singh Bahadoor
(Plaintiff) Appellant,

versus.

Gopal Chund Chowdhry and others
(Defendants) Respondents.

Mr. R. E. Twidale and Baboo Chunder Madhub Ghose for Appellant.

Mr. C. Gregory for Respondents.

Where a Deputy Collector refuses to sell a certain property in execution of the decree of a Revenue Court

and the applicant fails to bring a suit within the proper time for a declaration of his right to have the property sold, he cannot procure to himself more time by making a second application to the Deputy Collector for execution and having the refusal repeated.

A suit so brought cannot have its form changed and be treated as a suit to establish the lien which plaintiff obtained on the property, and to bring the same to sale for the discharge of that lien.

Phear, J.—As regards six annas of the property which is the subject of this suit, the plaintiff is precisely in the same situation as was the plaintiff in appeal No. 114,* and consequently the judgment which we have already given in that case applies to this. We may shortly state the situation, thus, namely, he has got a decree of the Civil Court ordering the sale of the property either by the one Court or the other, it is not necessary to determine which; and no cause is shown, as we have pointed out, why he should come to the Civil Court for a second order, or rather for the Court to repeat its former order.

But with regard to the remaining ten annas there is this difference between the two cases, namely, that the plaintiff has not got an order for sale in any shape. The present suit, as it is framed, asks for a declaration of the plaintiff's right to have the property sold by the Deputy Collector in execution of decrees which the plaintiff has obtained in the Revenue Court. The prayer of the plaint, no doubt, is not very definite. But there can be no question, we think, upon the whole plaint taken together from the beginning to the end, that the foundation of the plaint is the refusal of the Deputy Collector to sell this property in execution of those decrees upon the application of the plaintiff; and that the suit is brought to have the Deputy Collector put right upon this point. The first passage of the plaint states:—"Your petitioner brings this suit to set aside two miscellaneous orders passed by the fiscal authorities of Samdehee Sub-Division, Zillah Tirhoot, dated 26th May 1870, and to obtain an order for the sale of six-anna share * * * and also to obtain order directing the sale of ten annas share." And the 5th Clause of the plaint is:—"The order of the Collector" (that is, the order of the 26th May 1870, followed by another like order when the plaintiff applied for a second time) "the order of the Collector gave occasion for the institution of the present suit."

But if we take this suit as a suit brought under Sections 107, 110, and 111 of Act X of 1859, it appears very clear that it is out of

time: it certainly is so with regard to the first refusal of the Deputy Collector. And in our judgment the plaintiff cannot procure for himself more time by simply making a second application to the Deputy Collector for execution and getting the refusal repeated. Also when the application was made on that occasion, which we term the second time, and refused by the Deputy Collector, it is quite plain that the property was no longer in the hands of the original judgment-debtor, and consequently if the second order alone be looked at, it is clear that no order can be rightly made in this suit to the effect that the property in the hands of the third party ought to be taken and sold in execution of that decree.

Therefore, whether we start from the first refusal of the Deputy Collector or the second, this suit brought as it is to assert the plaintiff's right to have the property sold by the Deputy Collector in execution of the decrees of his Court entirely fails.

But we have been asked to treat this suit as if it were a suit brought in the Civil Court to establish the lien which the plaintiff says he has got by virtue of the kubooleut on this property, and to bring the property to sale in the Civil Court in order to discharge that lien. It is said that all the material facts which form the foundation of the plaintiff's right to bring such a suit, are set out in the plaint, and that these all have been met in the trial by the other side, and that all available evidence has been adduced both for and against it.

But Mr. Gregory, on behalf of the respondent, protests against our making this change in the form of the suit.

After giving the matter consideration, we think he is right in the position which he takes up to the effect that the proposed change would materially prejudice, or might materially prejudice, the rights of his client. It is obvious that, although it may be true that the plaint, as at present drawn, does contain an allegation of all the facts which would be essential to a cause of suit such as would entitle the plaintiff to a decree for sale in the Civil Court, yet the prayer of the suit does not ask the Court to take those steps which would be necessary to get a complete decree upon the footing of that cause of action. The suit having been brought merely for the purpose of getting an authoritative determination of the right of the plaintiff to have the property sold in the Collector's Court, nothing more was necessary for full relief than to prove the facts

* See preceding case.

which give rise to that right, because the remainder of the proceedings would devolve upon the Deputy Collector, who would sell so much of the property, and no more, as would satisfy the decrees. But if the property is to be sold by the Civil Court for the purpose of discharging the plaintiff's lien, then it is also necessary that the Civil Court should determine precisely what the nature of the lien is: how much is now due and liable to be charged upon the property by virtue of that lien; and finally to order the sale of the property and to apply the proceeds of sale to meet the balance due. Nothing of this kind has been asked for; there is nothing in the prayer of the plaint, or in any part of the plaint, which amounts to a request that the Court will take accounts of how much is due of the money which is charged upon the property by virtue of the covenant in the kaboolcut. And nothing of the kind has in fact been carried out in the Court below.

If, therefore, we change the form of the suit, we shall be obliged to send back the case to the first Court in order that an account should be taken.

But there is more than this. Mr. Gregory states, and it seems to be the fact, that pending this suit his clients have sold the property in question, and he maintains that they have in law only sold the property subject to the result of the suit as it originally appeared in the record, and as it still appears, until we change it. If then we change the nature of that suit, the purchaser will probably not be bound by the decree which may be finally made, and the consequences may be of very great prejudice to his clients. We are not prepared to say that this argument is not well-founded, and on the whole, we think, that we ought not to permit the suit at this stage to be taken in a different sense from that which was intended by the plaintiff when he came into Court.

It follows then that this appeal must be dismissed with costs as in the case of appeal No. 114 of 1872.

The 7th May 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Arbitration Award—Cause of Action—Act VIII
(B.C.) of 1869 s. 27.*

Case No. 1153 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 30th May 1872, reversing a decision of the Moonsiff of Culnah, dated the 11th May 1871.

Raj Narain Roy (one of the Defendants)
Appellant,

versus

Modhoo Soodun Mookerjee and others
(Plaintiffs) *Respondents.*

Baboo Kalee Prosunno Dutt for Appellant.

Baboos Rash Beharee Ghose and Rajendur Misser for Respondents.

Where parties to a suit agree to refer the question of title to arbitration, plaintiff relinquishing his prayer for possession, the agreement can only be understood as containing an implied undertaking that the possession of the land shall be given up by the defendant if the decision be adverse to him. Should the arbitration award prove adverse to him, and he refuse to deliver up possession, a new cause of action arises, and one of a different character from any mentioned in Act VIII (B.C.) of 1869 s. 27.

Markby, J.—THE peculiar facts of this case warrant us in supporting the judgment of the Lower Appellate Court without entering upon the difficult question of law which has been raised as to the applicability of the special law of limitation laid down in Section 27 of Act VIII of 1869 of the Bengal Council. In the former suit, the parties agreed to refer the question of title to arbitration, and it is impossible to understand that agreement in any other way than as containing an implied undertaking that the possession of the land should be given up by the defendant if the decision were adverse to him. When therefore, after the arbitration award, the defendant refused to deliver up possession, a new cause of action (as the Subordinate Judge rightly finds) arose, and one of a totally different character from any of those mentioned in Section 27.

Upon this ground, we dismiss the special appeal with costs.

The 7th May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Mortgage—Attachment—Execution—sale—
Decree—Registration.*

Case No. 183 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 25th April 1872.

Gossain Munraj Pooree (Defendant)
Appellant,

versus

Deen Dyal Lall (Plaintiff) Respondent.

Mr. R. E. Twidale and Baboo Chunder
Madhub Ghose for Appellant.

Baboo Nil Madhub Sen for Respondent.

Certain property which had been mortgaged to plaintiff by a bond executed by J. D. on 25th February 1867, was sold to him in execution of a decree passed upon that bond on 3rd September 1868. Before such sale, but after the above mortgage, the property was attached by defendant No. 1 in execution of a decree of 1865 (i.e., J. D.'s equity of redemption was attached), and a part of the property was sold. The sale was set aside for irregularity; but the attachment remaining, defendant No. 1 resumed proceedings in execution, and got an order for sale when plaintiff released it from liability to such sale by paying into Court the money due which he now seeks to recover:

HELD that defendant No. 1 had a right to sell the rights and interests of J. D. in the property, and was therefore entitled to keep the money which saved the sale.

The non-registration of a decree cannot be a reason why the decree should not be executed.

Phear, J.—It appears to us that this case is very plain notwithstanding the seeming complexity of the transactions which have taken place.

Without going further back than the decree on the kistbundee which was given in favor of the defendant No. 1 on the 21st April 1865, and without enquiring very narrowly as to the effect of that decree upon the property mentioned in the kistbundee, or as to the bonds which are mentioned in the kistbundee, it seems to be beyond dispute that that decree ordered the payment by the person whom we will call the judgment-debtor of the sum of 7,300 rupees in three instalments. These instalments were not paid according to the decree, and thereupon it became necessary for the first defendant to take out execution upon that decree. Plainly, if that decree be taken, as we have said, simply as a money decree, the first defendant could attach and sell in execution of that decree any property of his judgment-debtor which he could get hold of. Now at the time when default was made in payment of the money according to the terms of the decree, and afterwards, the property which is the subject of the present suit belonged to the judgment-debtor, for it is essential to the case of the plaintiff in this suit that that property was the property of the judgment-

debtor so late as the 3rd September 1868. He says it was mortgaged to him by a bond executed by the judgment-debtor on the 25th February 1867, and afterwards sold to him, the plaintiff, in execution of a money decree which was passed in his favor upon that bond on the 3rd September 1868.

Now we have it also beyond question that the defendant No. 1 did attach this property in execution of the decree of April 1865, sometime in 1868, after it had been mortgaged, as the present plaintiff says, to him in February 1867, but before it had been sold to him in June 1869 and April 1870.

At the time that he attached, then, his judgment-debtor had the rights of a mortgagor over it according to the very case of the present plaintiff, i.e., he had an equity of redemption which it was competent to the defendant No. 1 to sell after attachment. The attachment remained in being, and a sale of part of the property was had in December 1868. That sale was afterwards set aside on the ground of irregularity by a decree of the High Court. But obviously, as we think, the setting aside of that sale for irregularity under the circumstances which occurred, did not displace the attachment. The property was still left in the condition of attached property and liable to be sold under that attachment if the judgment-creditor went regularly to work for that purpose. And, accordingly, he did in fact resume proceedings in execution; got an order for sale, and the property was about to be sold pursuant to this order, when the present plaintiff released it from liability to be sold by paying into Court the money, which he now seeks to recover back in this suit.

It will be perceived from the statement of facts which we have made, that if the property had been sold, at any rate the equity of redemption, as against the present plaintiff, would have passed from the judgment-debtor into the hands of the purchaser. But that equity of redemption was the equity of redemption of a second mortgage, because the present plaintiff is unable to dispute the fact that before the properties were mortgaged to him in February 1867 they had been previously mortgaged to the defendant No. 1.

Under these circumstances, it might or it might not be worth the while of the present plaintiff to protect the property from being sold, to prevent the equity of redemption as regards his mortgage from passing out of the hands of the judgment-debtor into the hands of third parties by paying in this

money. If he had bought that equity of redemption himself, he still would have had to pay off the debt due by his mortgagor to the defendant No. 1 before he could realize his security. But whether it really was worth his while to do so or not, it seems to us quite clear that the defendant No. 1 had an entire right to sell the rights and interests of his judgment-debtor in the property which he had attached in 1868; that at the time of attachment those rights and interests at least amounted to an equity of redemption of the second mortgage to the present plaintiff; and that consequently the money which has been paid into Court in order to preserve that property from being sold is no part of it, money which has been paid in without consideration, but it is money which has saved the sale which the defendant No. 1 might otherwise lawfully have made, and therefore the plaintiff is entitled to keep it. It seems to us then that the plaintiff's suit entirely fails, and ought to be dismissed.

We have not found it necessary to discuss the question which has been raised before us, relative to the non-registration of the decree of the 21st April 1865, because it seems to us that the non-registration cannot by any possibility be a reason why that decree should not be executed.

We think the plaintiff's suit should be dismissed, and the appellant ought to receive his costs in both the Courts.

The 28th March 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock,
Sir Montague E. Smith, and Sir Robert
P. Collier.

Hindoo Widow—Maintenance.

On Appeal from the High Court of Judicature, North-Western Provinces, Allahabad.

Rajah Pirthee Singh

versus

Ranee Raj Kower.

A Hindoo widow does not lose her right to maintenance by reason of her leaving her husband's house, provided she does not leave for the purposes of unchastity, or for any other improper purpose.

THIS was a spit brought by Ranee Raj Kower against Rajah Pirthee Singh to recover arrears of maintenance, and also to

have a decree for future maintenance. Rajah Pirthee Singh was the adopted son of Rajah Petumber Singh, and the plaintiff was the fourth or youngest of four widows left by the late Rajah. The Subordinate Judge gave a decree in favor of the plaintiff, which was appealed to the High Court, who supported that decision and increased the amount of maintenance awarded by it. From that decision there is an appeal to Her Majesty in Council, which we now have to consider.

The defence set up by the adopted son was that the plaintiff had been provided with maintenance so long as she lived with the family of her deceased husband, but that she had quitted his house for improper purposes. He says:—"The defendant provided the plaintiff with maintenance so long as she remained in Ava" (that was the family house) "according to the family custom. In 1861 the plaintiff, disregarding her husband's honor, left for Kotah with Bhola Nath, contrary to the terms of the will and the family custom, and became an abandoned character. This being so, she has lost her right. Even after this, the defendant, to avoid scandal and to oblige her, and relying on her promise that she would no more let Bhola Nath have any access to her, allowed her lodgings at Durriyapoor, and regularly took care of her maintenance. The plaintiff's claim for maintenance prior to the institution of the suit is therefore illegal, and her claim for interest is also illegal, the payment of which was never stipulated. The plaintiff has nevertheless not parted with Bhola Nath, i.e., she has continued to act and behave contrary to her promise, disregarding the honor and custom of the family, and has not left off her former bad habits. She has, therefore, no right under the Hindoo law to have a maintenance fixed for her for the future." Now that defence on the part of the defendant has not been proved, and has been very properly given up. The plaintiff alleged that some dispute arose between her and the elder widow with regard to her jewels which she did not make out; and she has not made out any cause for leaving the residence of her late husband any more than the defendant has made out his defence. The question, therefore, comes to this: whether a Hindoo widow loses her right to maintenance by reason of her leaving her husband's house, provided she does not leave for the purposes of unchastity, or for any other improper purpose.

Several cases have been cited upon this point, and it will be as well to refer in the first instance to a case which was decided by the Privy Council, as that is one of the highest authority. That was a suit by Cossinath Bysack and another *vs.* Hurroosondry Dossee and another, which was tried in the Supreme Court in Calcutta, in which the Chief Justice, Sir Edward Hyde East, gave judgment. The question was put to the Pundits whether a widow was deprived of her property upon the ground of her having left her deceased husband's residence. Sir Edward Hyde East says:—"Upon the last ground of error the Pundits have uniformly answered that the widow was not bound to live with her husband's relatives. The eighth question put by the Court to their Pundits was: If a widow from a just cause cease to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate? A. If a widow for any other cause but for unchaste purposes cease to reside in her husband's family, and take up her abode in the family of her parents, her right would not be forfeited." He certainly goes on to say here there was a good cause at the time, namely, the extreme youth of the wife, and no pretence was made of the prohibited cause. It was alleged that, having left the residence of her deceased husband, and having refused to reside with the family, she did not forfeit the property which she had taken. That case was appealed to Her Majesty in Council, and was decided on the 24th June 1826. The opinion of the Judicial Committee was delivered by Lord Gifford. He says:—"With respect to the last supposed ground of error in this decree which was assigned by the appellants, namely, that it was not ordered by either of the decrees that Hurroosondry Dossee should reside with or under the care, protection, and guardianship of the appellants, who, as the surviving brothers of Bissonath Bysack, were alone entitled to have the care, protection, and guardianship of his widow, the Pundits appeared to be unanimous in the opinion that a Hindoo widow is not bound to live with her husband's relatives." That is the principle laid down. Then says His Lordship:—"I will read the eighth answer to the eighth question put, which will explain what the Hindoo law is upon the subject, and in that it appears the other Pundits who were called in agreed, or at least they expressed no objection to the

opinion pronounced. The question put is this:—"If a widow from a just cause ceases to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate?" The answer is, "If a widow from any other than unchaste purposes ceases to reside in her husband's family, and takes up her abode in the family of her parents, her rights would not be forfeited." Then His Lordship goes on to say:—"Now it was not pretended in the case that she had removed from the protection of her husband's family for unchaste purposes. She was only of the age of 14 years at the death of her husband. His brothers were young men, and she thought it more prudent and decorous to retire from their protection, and live with her mother and her family after the husband's death. Therefore it appears quite clear from the answers given by the Pundits that she did not forfeit the right of succession to her husband's estate on account of removing from the brothers of her late husband; that they had no right to insist upon her not withdrawing from them in order to put herself under the protection of her mother, and therefore there appears to be no foundation to that extent for the appeal." The reasons given that she was only of the age of 14 years at the death of her husband, and that his brothers were young men, do not appear to be the reasons upon which that decision was founded. It was merely pointed out, as their Lordships understood the judgment, for the purpose of showing that the widow was not removing from her husband's house for unchaste or improper purposes.

It, therefore, appears that a Hindoo widow is not bound to reside with the relatives of her husband; that the relatives of her husband have no right to compel her to live with them; and that she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes.

That decision is quite in accordance with the Vyavastha which are quoted by Shama-churn Sircar in his book called Vyavastha Darpana. At page 370, Vyavastha Nos. 199 and 200 are thus stated:—"Should a woman without unchaste purposes quit the family house, and live with her parents or other relations, she is still entitled to maintenance. The widow, however, is not enti-

"tled to maintenance" by residing elsewhere "without a just cause, if she was directed "by her husband to be maintained in the "family house." The husband in this case left a will, but he did not impose any condition upon either of his widows to reside in his family house after his death. He wrote a letter to the Collector, in which he stated that he did not wish that his widows should have the management of his property, and put the property into the hands of a mookteer, because, he said, it was of importance to maintain the reputation of his family. But it is no more than any other Hindoo gentleman would desire, that after his death his property should not be jeopardized, that the reputation of his widows should be maintained, and that they should not destroy the reputation of his family by destroying the reputation of themselves.

It has been held that the Hindoo law does not require a Hindoo widow, for the purpose of maintaining her reputation, necessarily to live with her husband's relatives. She does not injure her reputation by living with her own mother or her own father. It is laid down as a rule of law that she is not bound to live with her husband's relatives. The decision of the Privy Council was quite in accordance with those texts of the Hindoo law referred to by Shamachurn Sircar.

In the case of Shibasundari Dasi, the widow of Golackchander, cited in Baboo Shamachurn Sircar's book at page 381, in which Sir Lawrence Peel delivered a judgment, it appeared that Shibasundari Dasi, widow of one Golackchander, who died during his father Rammohan's lifetime, voluntarily left the family house (voluntarily, that is to say, without any cause except her own will and desire), and sued the defendants who were the surviving sons and representatives of the other sons of Rammohan for separate maintenance; a verbal reference had been made to three respectable Hindoos, Kashinath Mallik, Gobindaehander Banarjea, and Rammohan Neoghi, who awarded Rs. 12 per month as a sufficient allowance to her, she being allowed apartments in the family house and food. Sir Lawrence Peel said:—"We think she is entitled to a separate maintenance. The words food and raiment being too vague and ambiguous an expression, we must refer it to the master to inquire and report whether the amount offered was just and proper with reference to her situation in life." Then, in another case, "Srimati Mando Dari Debi, the eldest

"of the two widows of Tilakram Pakrasi, "a Hindoo native of Bengal, filed a bill "against his son praying that defendant "may set forth a full, true, and perfect "account of the property, and may be compelled by a decree to pay her the same." I believe it was not made a question about her having left the father's house, but in that case arrears of maintenance were awarded to her and future maintenance secured.

There was also the case of Jadumani Dasi vs. Khettramohan Shil, reported at page 384 of the same book, in which Sir Lawrence Peel, having considered the whole question, laid down the law in a clear and explicit manner. Every one who is acquainted with Sir Lawrence Peel must have the highest respect for his opinion upon all questions of this kind. He delivered the judgment of the Court. He said:—"The "question is whether a Hindoo childless "widow, who, some time after the death "of her husband, uncompelled by cruelty "or ill usage, left the house of the "family of her deceased husband, to dwell "at first in the house of her own father, and "subsequently with her aunt, living with "her own relations, the residence being in "all respects a proper one and her conduct "unimpeached, forfeits her right of maintenance out of the property which was that of "her deceased husband in his lifetime and "which had devolved on his heirs." There the question was whether the principle which had been laid down in the case cited from the Privy Council, which was applicable to property inherited by a widow from her deceased husband, was applicable to a case of maintenance. Sir Lawrence Peel, after referring to some conflicting authorities, said:—"This state of the authorities has induced us "to examine closely into the law on the "subject. We should not hesitate to follow "the decisions of the Sudder in preference "to those of our own Court, if they appeared "to us to be at once more just and more conformable to the Hindoo law. We have "intended to follow the Privy Council. The "Privy Council has, on the subject of the "right of the Hindoo widow to return to the "home of her parents, laid down a broad "rule, upon which it is not desirable to "infringe. That Court says, 'it was not "pretended that she had withdrawn herself "for unchaste purposes. She was only "14 at the death of her husband: his "brothers were young men, and she thought "it more prudent and decorous to retire "from their protection and live with her

“mother and her family after the husband’s death : therefore it appears quite clear from the answers given by the Pundits that she did not forfeit the right of succession to the husband’s estate on account of removing from the brothers of her late husband ; that they had no right to insist on her not withdrawing herself from them, in order to put herself under her mother’s protection.” The decisions of that Court must of course give the law to all Courts here. The answer of the Pundits which the Privy Council adopts is, that if a widow, from any other cause than unchaste purposes, ceased to reside in her husband’s family and takes up her abode in her parents’ family, her rights are not forfeited.” Then he says:—“In the Privy Council the question was whether the Hindoo heiress forfeited her estate, by selecting without impropriety her father’s roof for her residence. But it is to be observed that the opinion of the Pundits was generally expressed as to forfeiture of rights, and the Court expressed in general terms that the widow had a right under the circumstances to select that residence, and could not be compelled to reside under the roof of her husband’s family. This freedom of choice had respect to causes as applicable to a widow, not to an heiress as to one who inherited,” meaning to say, that the rule which had been laid down was equally applicable to a case of maintenance as it was to the case of property which the widow had inherited ; that is to say, that she was entitled to a freedom of choice, and that unless she left the residence of her deceased husband for unchaste purposes she could not be deprived either of the property which she had inherited from him, or be deprived of maintenance which the Hindoo law requires the heirs of her husband to provide for her.

We are therefore not now deciding the question for the first time. We are not now for the first time laying down a rule upon this subject. In the case of *Surno Moyee Dasse vs. Gopal Lal Doss*, reported in the first volume of Marshall’s decisions in the High Court, page 497, the widow sued for maintenance, and it was held that she was entitled to that maintenance notwithstanding she had left the residence of her deceased husband. The Court said :—“In this case a widow sues for maintenance. The defendant, who is her step-son, objects that she resides in the house of her father, and alleges that she is, therefore, not entitled to maintenance. The widow alleges that she

“left the family home because she was tortured or rendered uncomfortable, but did not prove that allegation. We find, however, that it is laid down in the *Vyavastha Darpana* of Shamaçhurn Sircar, the learned interpreter of the late Supreme Court, Vol. I, page 319, Section 160, that ‘should a woman, without unchaste purposes, quit the family house and live with her parents or own relations, yet still she is entitled to maintenance ;’ and in Section 161 ‘The widow, however, is not entitled to maintenance by residing elsewhere without a cause, if she was directed by her husband to be maintained in the family home.’ We think, therefore, that the widow is entitled to retain the decree for maintenance which she has obtained, and dismiss the appeal.”

In this case their Lordships are of opinion that there was no direction by the husband’s will which rendered it necessary for the widow to reside in her husband’s house. The case of a widow is very different from the case of a wife. A wife of course cannot leave her husband’s house when she chooses, and require him to provide maintenance for her elsewhere ; but the case of a widow is different. All that is required of her is that she is not to leave her husband’s house for improper or unchaste purposes, and she is entitled to retain her maintenance unless she is guilty of unchastity or other disreputable practices after she leaves that residence.

The case was tried by a Subordinate Judge, in this instance, who was a Hindoo, and therefore must be acquainted with the habits, usages, and religion of Hindoos ; and he thought that the widow having left the husband’s house, was still entitled to her maintenance, and he awarded her the sum of 150 rupees a month, with a sum of money calculated at that rate for the years during which she had not been allowed maintenance. The case was appealed to the High Court, and that Court thought that, having regard to the amount of the husband’s property, the widow was entitled to a larger sum ; and they awarded her maintenance at the rate of 200 rupees a month. Their Lordships do not think it necessary to disturb that decision. The amount of maintenance, it is stated in the *Vyavastha* 197 in Shamaçhurn Sircar’s book, should be fixed with reference to the proprietor’s estate. Now in this case the deceased husband left property to the extent of two lacs, or 20,000*l.* a year. It does not appear to their Lordships to be excessive, even though he left four widows, that

each of those widows should have at the rate of 200 rupees a month, equal to 240l. a year. Looking to the state in which a widow is bound to live and the religious duties which she is called upon to perform, it does not appear to their Lordships, having reference to the property of the deceased husband, that this widow ought to receive a less sum than that which has been awarded to her by the High Court, namely, Rs. 200 a month.

Some question was made as to the right of the widow to recover past arrears. A case was cited from the Madras High Court, in which arrears were awarded. In the case also in which Sir Lawrence Peel gave that elaborate judgment to which I have referred, arrears of maintenance were awarded to the widow as well as a decree in her favor with regard to future payments.

Under these circumstances their Lordships are of opinion that the decision of the High Court is correct, and they will, therefore, humbly recommend Her Majesty that that decree be affirmed with the costs of this appeal.

The 2nd April 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock,
Sir Montague E. Smith, and Sir Robert
P. Collier.

*Joint Family Property—Arbitration Award—
Limitation.*

*On Appeal from the High Court of Judi-
cature at Fort William in Bengal.**

Runjeet Ram Panday

versus

Goburdhun Ram Panday.

A Magistrate's order declared appellant to be in possession of three mouzahs, K, H, and M, and the respondents in possession of a mouzah called D. This led to two suits, one by appellant to obtain possession of D, and a confirmation of his title to K, H, and M, as well as three other mouzahs; and another suit by the respondents to obtain possession of K, H, and M. Appellant claimed to be entitled to a mokurree lease of the mouzahs; respondents asserting that the mouzahs were ancestral property belonging to the family, and that the mokurree had been granted to appellant on behalf of the family, and not on his own account. Before the proceedings in the suit had gone far, the parties agreed to refer the dispute to arbitration, and an award is said

to have followed. The appellants, however, asserted that the documents proving the agreement and award were spurious. The Lower Courts found that there had been an award, which was confirmed.

Going into the question of the authenticity of the award, the Privy Council agreed with the findings of the Courts below, and concluded that the mouzahs were joint property and were partitioned in the way declared in the award, and on the question of limitation also they found in favor of the respondents.

THIS is an appeal from decrees of the High Court of Calcutta affirming the judgments of the Principal Sudder Ameen in two cross suits relating to some mouzahs in Zillah Gya in Behar. A Magistrate's order had been made prior to the suits, which dealt with four of the mouzahs referred to in them. The effect of that order was to declare that the appellant was in possession of three mouzahs, Khyra, Hussra, and Moojooratro, and that the respondents were in possession of a mouzah called Dalla Kullan. It appears that the immediate reason for requiring the intervention of the Magistrate was some disputes with reference to Dalla Kullan. A man had been murdered in the course of an affray in that mouzah, and the evidence given before the Magistrate appears to have related principally to it. There appears to have been little or no evidence given before him as to the other mouzahs; but undoubtedly his order is that the appellant should remain in possession of Khyra, Hussra, and Moojooratro, and that the respondents should remain in possession of Dalla Kullan.

The Magistrate's order led to the two suits which gave rise to the judgments under appeal.

The appellant, Runjeet Ram, brought the first of these suits to obtain possession of Dalla Kullan, and a confirmation or declaration of his title with regard to the three mouzahs, Khyra, Hussra, and Moojooratro; and he included in the latter part of the suit, that is, in the prayer for confirmation, three other mouzahs. One of those mouzahs, Rutnagh, was in the suit declared to belong to him, and no question arises in the appeal respecting that mouzah, or with respect to the two other mouzahs, Dhnjabun and Kantee, for which he sought a confirmation of title.

The second suit was brought by the present respondents, and that suit was to obtain possession of the three mouzahs which the Magistrate's order had declared to be in the possession of the appellant. Therefore the questions which arise under the two suits in the present appeal are the same with reference to the four mouzahs,

* From the judgment of Bayley and Macpherson, JJ., in Regular Appeals, Nos. 337 and 338 of 1867, decided 4th March 1869.

Dalla Kullan, Khyra, Hussra, and Moojooratro; first, the question of title, whether they belong to the appellants or the respondents? and next, the question arising on the statute of limitations.

The first question to be considered is the main one; namely, the title. The dispute between the parties arose in this way. The appellant, Runjeet Ram, claimed to be entitled to a mokururee lease of the mouzahs, which undoubtedly had been granted to him, and in his name only, as his own self-acquired property. The respondents asserted that, though the mokururee had been granted to him, the mouzahs contained in it were old ancestral property belonging to the family, and that the mokururee was granted to Runjeet Ram on behalf of the family, and not on his own individual account. That dispute had been brought into a Court of Justice; but before the proceedings had gone far in the suit, the parties, it is said, agreed to refer the question to arbitration, and it is said that an award followed upon the agreement.

Now, on the part of the appellant it is asserted that the documents which appear upon the record,—which undoubtedly, if they are genuine, show that there was an agreement to refer, and an award confirmed by an order of Court,—that all those documents are spurious and fabricated. The main question is, whether that contention is established or not?

It may be observed in the outset that the Principal Sudder Ameen of Gya and the High Court have given concurrent judgments upon it. They have come to the conclusion that there was a submission to arbitration, and that the award set out in the record has been proved; and they are also of opinion that the order of the Civil Court confirming that award was proved.

The respondents have given some evidence that before the submission to arbitration the property included in the mokururee pottah granted to Runjeet Ram had been held by his father and his grandfather. And it does appear from the receipts given in evidence in the cause that this was so, which certainly negatives what is put broadly forward by Runjeet Ram that he acquired this mokururee for the first time by his own exertions. However, the evidence before the date of the submission to arbitration is not very strong.

The agreement to refer appears to have been made in January 1834. It is an agreement made by the then members of the family.

It states that “a suit arising from contention about shares amongst us is pending in Court, and is now entered on the special board for trial;” and then it goes on to say:—“We have constituted” * * four persons, one of whom is Gunnesham Singh, * * “and undertake in writing that “we will, without demur, abide by and be “governed by the decision with regard to “the allotment of shares which these arbitrators may pronounce.” If genuine, it is a perfectly good submission to the arbitration of these four persons.

Now this agreement is proved to have been executed by the testimony of Gunnesham Singh, one of the arbitrators, and it is authenticated by the signature of Mr. Smith, the Commissioner of Patna, who also signed the mokururee lease; and it may be observed that Runjeet Ram, who was examined before the Magistrate, does not deny that such a submission was made, although he says that no award followed it. The evidence, therefore, of the ikrarnamah, or agreement to refer, seems to their Lordships to justify the findings of the Courts below that it is a genuine document.

It appears that two days after the date of the ikrarnamah a mokururee pottah was granted by the Maharajah Domurnath Sahee, who is described as owner and mokurureedar of Pergunnah Beelouca, of the mouzahs now in dispute and of several other mouzahs to Runjeet Ram, to be held from generation to generation at an annual rent of sicca Rs. 258. Runjeet Ram's claim arises from this pottah having been executed in his own name, and the pottah, no doubt, is consistent with his case that it was self-acquired. But it bears date two days only after the submission to arbitration, and the two documents appear, when regarded by the light of the subsequent award, to have been made contemporaneously, for the purpose of having the property placed in the name of one of the family as a convenient form for vesting the mouzahs in the family upon a clear mokururee title.

The next document to which reference should be made is the disputed award itself. That of course is the most important document in the case, for it is the evidence of the title set up by the respondents. The award is very full in its statement. It sets forth the substance of the claims advanced on both sides, and then declares the course which the arbitrators themselves took to arrive at a proper decision upon the question referred to them. It states:—“As by inquiries from

"the neighbours, and from the deposition of the witnesses, such as the putwaree, jeth ryot, and cultivators of the contested mouzahs and shareholders, also on a reference to some papers of a suit in a Court of Justice, filed by the opposite party, the fact of the aforesaid mouzahs having been acquired by the ancestors of the parties while together, and that they remained in joint possession of the shares as alleged by the opposite party, has been proved and established." Therefore, if this be genuine, these four arbitrators decide that these mouzahs had been in the family, and had been acquired by the ancestors of the parties, and that they had remained in joint possession. Then the ordering part of the award is "that the claim of the first party, that is, Runjeet Ram, to the entire 16 annas of the contested mouzah be disallowed." It thus appears that he had put forward his claim, as he does now, and it was after this investigation disallowed. It goes on:—"The first and opposite parties shall remain in possession of the whole of the property in dispute in equal moieties, as per detail subjoined to this award." Then the detail is given, and certain mouzahs are allotted to Runjeet Ram, including Mouzah Rutnagh; and certain other mouzahs are allotted to the predecessors in title of the respondents, which include the four mouzahs, which were the subject of the Magistrate's order, and are those in question in the present appeal.

It is important to observe that the award refers to the mokururee pottah, and provides for the mode in which the mokururee rent shall be paid. The mode in which that is provided by the award is this:—the rent is divided, and it is assumed that one half of it, or Rs. 129, would be payable equitably according to the allotment by those whom the respondents now represent; but for convenience it was provided that the whole rent should be paid by Runjeet Ram; and certain mouzahs, or the produce of certain mouzahs, were given to him in order to compensate him for the share of the rent which he was to pay for them. In consideration of having the produce of those mouzahs, he was to pay the whole rent and to indemnify the other branch of the family from the one half of it. That accounts for his continuing to pay the rent, which appears to be the same as the Government revenue, and accounts for all the receipts for the rent being in his own name and for the fact that none appear in the names of the respondents.

The authenticity of this award has been

very strongly disputed. It was produced in the Courts below, where the Judges were much better able to decide upon the view of it than their Lordships can be as to its genuineness; and those Courts, having seen the document, and having heard all the evidence, came to the conclusion that the document was genuine. It would be contrary to their Lordships' usual practice to find that an instrument of this description was spurious and fraudulent against the concurrent findings of the Courts below. Undoubtedly there may be cases where the inference is so strong from the evidence that that might be done, but it is evident that such cases must be extremely rare. Their Lordships find no evidence which leads them to the conclusion that the Courts have come to a wrong finding upon the authenticity of this award. On the contrary, there are two circumstances, independently of the general history of the case, which appear to their Lordships to be very strong in its favor. The first is that one of the arbitrators, the only surviving one, Gunnessham Singh, was examined as a witness, and distinctly stated that, although he could not recollect the substance of the award, yet that an award was made. Therefore the assertion of Runjeet Ram that no award followed the submission is clearly disproved by one of the arbitrators themselves; and if any witness is to receive credit in India, there can be none entitled to higher credit than those whom the parties have selected to settle their disputes, and to whose position and respectability they have therefore both borne practical testimony. But again, if this was not the award, Runjeet Ram might have proved that fact. He might have said this award is not that which was made by the arbitrators, and have stated circumstances which would have enabled the Court to decide upon his assertion, if it really had been a true one. But he abstains altogether from going into the witness box to deny the authenticity of that which he asserts upon his pleading to be a spurious and fabricated document.

Their Lordships, therefore, are unable to come to any other conclusion than that it is their duty, so far as this instrument is concerned, to agree with the findings of the Courts below.

Another document appears upon the record, which undoubtedly is open to the strong observations which have been made upon it very ably by Mr. Doyne. That is a proceeding in the Civil Court of the district

of Behar, which professed to be a confirmation of the award in a suit brought for that purpose. It is dated the 15th April 1837. It, no doubt, on the face of it, is an order which recites that a suit was brought upon the award for the purpose of having it confirmed and enforced; and it concludes in this way:—"It is, therefore, ordered that 'without the arbitrators being cited and 'without hearing their depositions, the arbitration award in this case, as the claim is 'admitted, be confirmed.'" Various objections to this order arose from improbabilities appearing on the face of it. They are set out in the judgment of the High Court. The High Court, admitting that these improbabilities exist and are strange and irregular, still think that they may be accounted for upon the reason that, at the time when the order was made in the year 1837, the proceedings of the Courts were characterized by some irregularities. Their Lordships think that if the case had depended on this document alone, it would have required very great consideration on their part before they could have acceded to the view taken by the High Court regarding it. But in the view they take of the case, they do not think it necessary to give any opinion of their own upon its genuineness; for, assuming it not to be a genuine document, still the award to which they think they are bound to give credit remains; and that award is sufficient to establish the proposition for which the respondents contend, namely, that these mouzahs belonged to the family as joint property, and that the mokururee pottah was granted to Runjeet Ram, not for himself only, but on behalf of the joint family, and therefore that at the time of this award he held the whole of the mouzahs contained in the pottah for the benefit of the family. No question of time arises under Regulation VI of 1813; for this is not a proceeding to enforce the award in a summary way, but it is a regular suit founded upon the original joint title and the subsequent partition; and the award and the proceedings which led to it, are used only as evidence in proof of that title, and to show that the mokururee pottah was granted for the benefit of the family.

Their Lordships have, therefore, come to the conclusion already in effect stated, namely, that these mouzahs were joint property, and were partitioned, or were awarded to be partitioned by the award in the way in which that instrument declares them to be allotted.

With regard to limitation, an objection is made to the right of the respondents to recover in the suit which they have brought for the recovery of the three mouzahs, Khyra, Hussra, and Mōojooratro; and the same objection is made to their title to hold Dalla Kullān, upon the ground that the possession since the award has been with Runjeet Ram, and not with them. The objection turns upon the statute of limitations, and must be dealt with as one under the statute. This question has occasioned some difficulty to their Lordships in consequence of the manner in which it has been dealt with by the Courts below. The award, which must now be assumed to be valid, directed that the mouzahs should be allotted, some to the appellant and some to the respondents; and from the time of the award, undoubtedly the possession, to be in accordance with it, should have been the separate possession by the different parties of the several mouzahs allotted to them. The Principal Sudder Ameen and the High Court have held that the possession of Runjeet Ram would be the possession of the rest of the family, treating him as the holder of the mokururee grant as a trustee for them. Neither Court appears to have considered the question of the possession in fact of these mouzahs, but they have rather assumed that if the possession was with Runjeet Ram it would still be, under the circumstances, the possession of the whole family, and not an adverse possession by him against them. Their Lordships are not prepared to agree with that view, because undoubtedly that is not the case which is set up by either of the parties, and it is not consistent with what might presumably be expected to have followed the award. Their Lordships, therefore, have been obliged to look at the evidence, unassisted by any findings of the Courts below upon the fact of possession. They have had to consider whether they were able to form a judgment upon the evidence as it stands for themselves, or whether it would be their duty to send the case down for further investigation and inquiry. The latter course is clearly undesirable, as it would necessarily involve a new inquiry at great expence, and at a distance of time when the evidence might have disappeared, and witnesses who might at an earlier stage have been called were gone. They have, therefore, felt that they would best administer justice between the parties by deciding this question for themselves.

Now first of all, with regard to Dalla

Kullan, their Lordships have looked very carefully at the evidence, and they think that, with regard to that mouzah, the evidence is tolerably clear that the possession was with the respondents before the Magistrate's order. The Magistrate has so found, and his attention was certainly called to that mouzah from the circumstance already adverted to; and there is very strong evidence in the record that it was in the possession of the respondents. It is also to be observed that Gunnesham Sing, the arbitrator, says that it was in their possession at an early time after the award.

Their Lordships, therefore, think that it is established that Dalla Kullian was in the possession of the respondents within 12 years before the commencement of the suit; and if it was in their possession at any time within that period, the statute cannot be set up as a bar against the title, which must now be assumed to be in them. Their Lordships cannot fail to observe that if they are right in the conclusion that Dalla Kullian has really been in the possession of the respondents, that fact very strongly supports the contention that the award is a genuine instrument,—because, undoubtedly, that mouzah is included in the mokururee pottah, and no suggestion has been made as to how it came into the possession of the respondents, unless under the award which gave them title to it, notwithstanding the apparent title of the appellant by reason of its being included in the mokururee grant.

With regard to the other three mouzahs, Khyra, Hussra, and Moojooratro, the evidence is more conflicting. There is evidence on both sides. There are several witnesses who say that those mouzahs were in the possession of the appellant; but there are several others who speak very distinctly of the possession of the respondents. The best-named witnesses speak to a possession for a considerable period of time. Some of them say they themselves cultivated the land in the mouzahs, and shared the produce with the respondents. It is, of course, extremely difficult to come to a conclusion which is satisfactory to the mind upon evidence of this kind. The Magistrate's order with regard to those mouzahs has certainly not the weight which it has with regard to Dalla Kullian. He does not appear to have taken evidence with regard to them.

Mr. Doyne relied upon certain mortgages which had been made of one of the mouzahs, Moojooratro. It appears that in 1838 that mouzah was mortgaged to Gunput Sahoo.

Various proceedings were taken, and time given; and ultimately in 1862 there was an acquittance, in which it appears that the mortgage debt was included with other sums, and discharged. It is to be observed that there is no evidence whatever that the mortgagee took possession of the property mortgaged to him, or that the mortgage itself was in any way brought to the knowledge of the respondents.

In 1852 there was a mortgage of Dalla Rutnagh, which is said to have included Dalla Kullian, to Koonjbehary Lall, who was the heir of Gunput Sahoo, which does not appear to have been connected with the former mortgage. The mortgage itself does not appear to have been disclosed to the respondents; but Mr. Doyne relies upon the circumstance that in 1862 there was an attachment preparatory to a sale, which, he says, must have given the respondents notice of the mortgage, and that they did not then intervene; and he derives an argument from their abstention to do so. But it must be observed that the attachment was not followed by a sale; for, within a week after its date (the 10th July 1862), viz., on the 17th July, part of the money was paid off, and further time given, and all proceedings on the attachment were stayed. It appears, however, that three years later, in 1865, an order for sale was made; and that order for sale being made, and there being apparently an intention to act upon it, on the 20th September 1865 the respondents intervened, and petitioned, stating their title to the mouzahs they now claim precisely in the way they put it forward in this suit. They stated also that the appellant had improperly included their mouzahs in this mortgage by the general term Dalla Rutnagh, which was the name of the mahal; that he had not separated his own mouzahs from theirs, but had mortgaged the whole by the general term Dalla Rutnagh. Upon the intervention of the respondents effect was given to it, not apparently by a decision of the Court, but by the acquiescence of the creditors, who allowed these mouzahs to be excepted out of the order which was made for sale. It seems to their Lordships that the intervention by the respondents at that time is strong evidence of an assertion of title, which could hardly have been made if they had really been out of possession from the time of the award.

In the midst, therefore, of this conflicting evidence their Lordships think it right to consider whether there is any presumption

to be derived from the other parts of the case in favor of the one side or the other. Now the ordinary presumption would be that possession went with the title. That presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession, as there is here, on the part of the respondents,—opposed by evidence, apparently strong also on the part of the appellant,—their Lordships think that, in estimating the weight due to the evidence on both sides, the presumption may, under the peculiar circumstances of this case, be regarded; and that, with the aid of it, there is a stronger probability that the respondents' case is true than that of the appellant.

It may also be observed that their Lordships are not disposed to give great credit to the evidence brought forward by the appellant, inasmuch as his case, which rested upon the theory that, he had acquired this property for himself, has been found to be wholly untrue.

In the result their Lordships will humbly advise Her Majesty to affirm the judgments of the Courts below, and to dismiss this appeal with costs.

The 4th April 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock,
Sir Montague E. Smith, and Sir Robert
P. Collier.

*Ancestral Property—Execution-sale—Rights of
Adopted Son.*

*On Appeal from the High Court of Judi-
cature at Fort William in Bengal.**

Rajah Debendro Narain Roy.

versus

Coomar Chundernath Roy.

Plaintiff came into Court to follow into the hands of the defendant certain property to which the latter had

by transfers acquired the title of the purchaser at an auction held in June 1843. The ground of his claim was that the late owner, who died before the sale, had left his widow a permission to adopt a son, and thereupon in 1856 she had adopted plaintiff. His contention was that the sale was of the widow's interest merely, the permission to adopt having given to her, in the event of an adoption, a life-interest in the property; and that upon her death in 1865, his interest accrued:

Held that, as the proceeds of the execution sale were not applied to satisfy only a liability incurred after the owner's death, but also decrees for other debts for which the estate was liable, there was no substantial ground to impeach the long title acquired by the respondent.

It is not necessary for their Lordships to express at any length the grounds on which they think that this appeal must be dismissed. The plaintiff comes into Court to follow into the hands of the defendant, who by intermediate transfers has, acquired the title of the purchaser at an auction sale, which took place so long ago as the 10th June 1843, the property which was then sold. The grounds upon which he does this are, that the late Rajah Shib Prosad Roy, who died some time before the sale, was the undoubted owner of the property; that Rajah Shib Prosad Roy left an unnoomuttee puttro, by which he authorised his widow to adopt a son; and that in the year 1856, more than twelve years after the sale, she exercised that power in favor of him, the plaintiff. However, nothing turns upon the point of time. His contention is that the sale must be taken to have been a sale of merely the widow's interest, and that upon her death, in the year 1865, his interest for the first time accrued, and that he was therefore entitled to commence this suit for the purpose of recovering the property in July 1868. The nature of the unnoomuttee puttro is peculiar, in that it did not leave the widow's estate to be defeated immediately by the adoption, as in the ordinary case, but to her in the event of an adoption, his interest in the property. Hence the plaintiff of the appellant did not commence his suit until the widow's death. If this suit were allowed, it certainly would be a flagrant illustration of the extreme inconvenience which often flows from the limited nature of a widow's estate, and from the consideration which is introduced into the devolution of estates by authorities to adopt which considerable time are not acted upon. But of course

* From the judgment of Couch, C.J., Loch and Hobhouse, J.J., in Regular Appeal No. 234 of 1869, decided 25th August 1870.

if the facts supported the contention of the appellant, it would be their Lordships' duty to apply the law without regard to such inconveniences, or to the hardship upon the purchaser at the execution sale, and those who claim under him. It appears, however, to their Lordships that in this case there are no reasons whatever why they should apply that harsh law. If the only execution under which the property was sold, and the only liability which the proceeds of the sale were applied to satisfy, had been that incurred after the death of the Rajah Shib Prosad Roy, in the proceedings taken ineffectually to contest the foreclosure of the mortgage, and the recovery of the mortgaged property, it might still be a question whether that were not a liability which bound the inheritance, inasmuch as it was incurred by the Court of Wards as representing the whole estate, and with the *bonâ fide* object of protecting the whole estate. It does not seem, however, to their Lordships to be necessary to rest their decision upon that ground, since the view taken in the able judgment of the High Court affords a more satisfactory ground upon which to place it, that ground being that the property had in fact been also attached in satisfaction of decrees for other debts for which the estate of the Rajah was beyond all question liable; and that although the sale was had under the attachment issued in the suit of the mortgagees, the property was in fact sold in satisfaction of all the decrees that had been recovered affecting the property, the proceeds of the sale being paid in the usual way into the Collectorate, and there applied among the decree-holders, some of whom most unquestionably had subsisting and valid claims against the estate of the Rajah.

Under these circumstances, their Lordships fully concur with the High Court in thinking that the appellant has no substantial ground upon which he can impeach the long title acquired by the respondent under the execution sale. It is, therefore, wholly unnecessary for their Lordships to consider whether the evidence supports the conclusion of the High Court upon the question whether Anund Moyee Dabee had abandoned the world before her death, or whether the Court of first instance was correct in holding that that case had not been established.

Their Lordships must humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal. The costs of course ought to follow the result.

The 2nd May 1873.

Present :

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

Execution—Decree—Bonâ fide Steps by Decree-holder.

Case No. 245 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 25th June 1870.

Chowdhry Wahed Ali (Decree-holder)
Appellant,

versus

Mullick Enayet Ali (Judgment-debtor)
Respondent.

Messrs. J. T. Woodroffe and R. E. Twisdale for Appellant.

Mr. G. Gregory for Respondent.

Any act of the Court done in the course of execution proceedings, *e.g.*, the confirmation of a sale, is an act done in keeping in force the decree.

The fact that steps taken by a decree-holder to execute his decree have been unsuccessful or infructuous, does not necessarily show that he did not proceed in a *bonâ fide* manner.

Kemp, J.—THIS case was remanded on the 1st April 1870 by the late Justices Bayley and Norman,—Enayet Ali, one of the judgment-debtors, being then appellant, and Wahed Ali, the decree-holder, respondent. The parties have now changed places, Chowdhry Wahed Ali being the appellant, and the judgment-debtor respondent. The learned Judges who remanded the case seemed to be of opinion that, if proceedings were taken against one of the co-debtors, Mussamut Teetoo, these proceedings would be sufficient to keep alive the decree as against the other judgment-debtors; but not being able to refer to the original decree, the learned Judges remanded the case to the Judge of Patna, with directions to ascertain whether the decree was a joint decree, and whether as such it had been kept alive by proceedings taken against Mussamut Teetoo.

On remand, the Judge of Patna, on the 25th of June 1870, after observing that Mussamut Teetoo was a party to the suit in two capacities, namely, in her own right and as heiress of Waris Ali, was of opinion that inasmuch as her objections, after protracted litigation had prevailed, and she was "discharged," to use the word of the learned

Judge, by the order of the High Court on the 12th of December 1866, it cannot be said that the decree-holder was proceeding in good faith, although in the opinion of the Judge he was doing his utmost to get the money out of Mussamut Teetoo. The application therefore to execute the decree as against Enayet Ali was considered to be barred, and the application was rejected.

In appeal it is contended that the Judge was wrong in holding that the appellant's attempts, because they were unsuccessful, must be considered not to be *bonâ fide* so as to save limitation; that the entire circumstances and facts of the case show that Mussamut Teetoo was liable; that the decree was a joint one, and that the appellant was justified in proceeding against any one of the co-debtors; that the proceedings against Mussamut Teetoo were in law sufficient to keep the decree alive; and that at any rate the limitation ought to be counted from the date of the order of the High Court, namely, the 12th of December 1866.

It appears that the decree-holder Wahed Ali, under a *zur-i-peshgee* title, sued for refund of the *zur-i-peshgee* in respect of a share originally claimed as a 13g. 2d. 7c. 12b. share of Mouzah Moyarah. He obtained a decree on the 1st of July 1852, and on proceeding to execute that decree, he was opposed by Waris Ali, who claimed under two *bharna* leases which he said had been made over to his son-in-law Enayet Ali, and by Mussamut Jumaye and Mussamut Teetoo, the daughters of Waris Ali, who alleged purchase prior to the *zur-i-peshgee* of certain shares from the original proprietors; and in the case of Mussamut Teetoo, there was a further claim as *kutkinadar* of 175 beegahs. These objections appear to have been rejected, and the property was put up for sale on the 12th of December 1853 and purchased by Wahed Ali, the decree-holder, who, not being able to obtain possession, sued for possession, basing his suit on the same title, namely, the *zur-i-peshgee* title; and in that suit Enayet Hossein, Mussamut Jumaye and Mussamut Teetoo, the two daughters of Waris Ali, and Enayet Ali were made parties. There were other parties to that suit, something like 200 in number, but it is not necessary to mention their names. We observe here that in this suit Enayet Hossein, Mussamut Jumaye, and Mussamut Teetoo were sued, not only in their own right, but as representing the estate of Waris Ali, who had died. On the 29th of November 1861, a decree was passed in

favor of the plaintiff. The share originally claimed was decreed in full, although the judgment reserved a small fraction, the Judge being of opinion that the two ladies, Mussamut Jumaye and Mussamut Teetoo, had made out their claim to a fractional share of 18d. 5c. 12b. The decretal order has been read to us, and is to this effect, that the suit be decreed with mesne profits as far as they can be ascertained in execution of the decree, to be charged upon the defendants jointly and severally; the costs of the plaintiff to be paid by the defendants, and each of the defendants to pay their own costs.

Subsequent to this decree, there was a protracted litigation. In the case of Mussamut Jumaye, the litigation culminated in a decision of the Privy Council to be found in Volume XVIII, Weekly Reporter, page 105. This lady, Mussamut Jumaye, on the suggestion of the High Court, brought a suit against Chowdhry Wahed Ali to obtain a declaration that the sale in execution of certain mouzahs under a decree made in the former suit brought against her and others by the appellant be set aside, and her possession of the mouzahs confirmed. Mussamut Jumaye appears to have been successful in this Court, and the appeal went up to the Privy Council on the part of Chowdhry Wahed Ali. Their Lordships finding it not satisfactorily established that there was any existing decree that warranted any execution whatever against the respondents, and further that, under the peculiar and exceptional circumstances of the case, Section 11 Act XXIII of 1861 was not a bar to the suit. The decree of this Court was therefore affirmed, and the appeal dismissed. This was on the 14th of June 1872.

In the case of Mussamut Teetoo, after protracted litigation, the appeal of Chowdhry Wahed Ali to this Court was dismissed on the 12th of December 1866, and Mussamut Teetoo was absolved. Then proceedings were taken against Enayet Hossein, and the sale took place on the 2nd of June 1866. That sale was confirmed on the 8th of August 1866. Chowdhry Wahed Ali became the purchaser at the sale, and put in a receipt in satisfaction. Subsequently, on the 5th of July 1869, an application was made by the decree-holder to execute his decree against Enayet Ali, the present respondent. The question, therefore, is whether the application made on the 5th of July 1869 is barred under Section 20 Act XIV of 1859. We are clearly of opinion that it is not barred.

It is proved that the sale was confirmed on the 8th of August 1866. It is said, and this also seems to have been the opinion of the late Justice Norman, that the decree-holder is not entitled to date from the date of the confirmation of the sale. It seems to us that, under the Full Bench Ruling in the 6th Volume, Weekly Reporter, which judgment was subsequently noticed and approved of by the Privy Council in a decision to be found in XIII Moore's Indian Appeals, in which the Maharajah of Burdwan is the appellant,* that any act of the Court,—and the confirmation of the sale would be an act of the Court,—would be an act done in keeping in force the decree. In this case it is clear that the decree-holder, who is the purchaser at the sale which took place on the 2nd of June 1866, received money, or did that which is tantamount to receiving money, by giving a receipt for the purchase-money of the property, and that act on his part could not have been done until the sale was confirmed. Therefore, we think that, taking the 8th of August 1866 as the date of the last act done in keeping this decree in force, the present application made on the 5th of July 1869 is in time.

We are further of opinion that, looking to the acts of the decree-holder from the time he obtained his decree many years back, up to the 12th of December 1866, in the case of Mussamut Teetoo, and up to a much later date in the case of Mussamut Jumaye, he was all along endeavouring to execute his decree. Their Lordships of the Privy Council, in a decision to be found in Volume XIII, Weekly Reporter, page 479, observe that it does not follow that, because the steps taken by a decree-holder are unsuccessful or infructuous, therefore it must be held that he has not proceeded in a *bonâ fide* manner to keep his decree alive. The case of the Maharajah of Burdwan above alluded to was a very peculiar one, and this case is much stronger. In the case of the Rajah, he had made the mistake of applying to execute his decree in the wrong case. Their Lordships held, however, that this proceeding, although it was a mistake, showed a *bonâ fide* intention on the Rajah's part to execute his decree, and he was allowed to do so. We, therefore, think in this case that the decree-holder is entitled to execute his decree, and the decree being a joint one, he is entitled to execute it against any of the parties he may choose to

select. He first attempted to execute it against other parties, and was unsuccessful. He is now seeking to execute it against Enayet Ali; and as his application of the 5th of July 1869, as shown above, is not barred, we reverse the decision of the Court below and decree this appeal with costs. Pleadar's fees five gold mohurs.

The decree not awarding any interest, this Court passes no order as to interest.

The 6th May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Valuation of Suits—Mode of Computation—
Jurisdiction.*

Case No. 843 of 1872.

*Special Appeal from a decision passed by
the Officiating Judge of Patna, dated
the 12th March 1872, affirming a deci-
sion of the Moonsiff of Beharar, dated
the 21st June 1871.*

Nauhoon Singh (Defendant) *Appellant,*

versus

Toofanee Singh (Plaintiff) *Respondent.*

*Messrs. R. E. Twidale and C. Gregory for
Appellant.*

*Baboo Mohesh Chunder Chowdhry for
Respondent.*

Following the decision of a Divisional Bench, reported in 18 W. R., page 109, it was held that the amount or value of the subject-matter in dispute in a suit should be estimated for the purposes of jurisdiction, not according to the rules of the Court Fees Act, but by the aid of the best evidence available bearing upon the actual amount or value.

Phear, J.—THIS was a suit brought to enforce a right of preemption. The property which had been sold was sold for Rs. 2,000, a consideration which may, under the circumstances of the case for the moment, be taken to represent the market value of the property. This suit, however, is valued only at Rs. 200. The Lower Appellate Court says:—"The first objection raised was want of jurisdiction. As regards this it is urged that the plaintiff has under-valued his suit. Now it is true that the value of this suit is still placed at Rs. 200, the very amount which was declared to be an improper valuation at the time when the former suit was brought;

* 14 W. R., P. C., 21.

"but then the present suit was not instituted until after Act VII of 1870 came into force; and under Clause 6 of Section 7 of that Act, in suits to enforce a right of preemption, the value is computed in accordance with paragraph 5 of that Section, and in paragraph 5 the value is declared to be ten times the revenue. Hence the present suit has been properly valued."

Thus it appears that the Lower Appellate Court has overruled the objection as to the valuation of the suit upon the ground that the method of valuing pursued has been that which is directed by the rules of the Court Fees' Act of 1870.

On special appeal, it is urged that this ruling is wrong, and that, for the purpose of jurisdiction in the Moonsiff's Court, the valuation ought to have been made according to the market-value of the property, and not according to the special rules prescribed in the Court Fees' Act.

We are of opinion that this objection is a good ground to support the special appeal. It appears to us that the decision of the Division Bench, which is reported in page 109 of the 18th Volume of Mr. Sutherland's Weekly Reporter, does in fact conclude the matter; and that unless we are prepared to differ from that decision, we must give effect to the objection which has been made on special appeal.

The present Chief Justice in that case delivered the opinion of the Bench, and as the judgment is not a long one, we will read it in full:—"The Subordinate Judge has held that the decision of the Moonsiff upon the question as to what was the value of the subject-matter in dispute with reference to the jurisdiction of the Court is final under Section 12 of the Court Fees' Act. Now it is admitted by Mr. Gregory that that is not so, and that would at once dispose of this special appeal, because it shows that his decision is erroneous, and that it would be necessary that the case should go down to him again. But upon the other question; namely, whether the value for the purpose of jurisdiction is to be computed according to the Court Fees' Act, we think there is nothing to show that it was the intention of the Legislature that that mode of computing the value was to be applicable to the question of the jurisdiction of the Court, and was to be used in ascertaining what was the value of the subject-matter in dispute.

"Act VII of 1870 is an Act for making

"the Court fees payable, and after providing in Section 6 that the fees shall be paid, there followed a series of provisions with regard to the way in which the Court fees shall be estimated. In suits for lands, houses, and gardens, it is according to the value of the subject-matter, and such value shall be deemed to be as provided by the Act. We think that this must mean that the value is to be deemed to be such for the purposes of the Court fees only, and not for other purposes. And Section 12 appears to support this view, because it treats this as being a question relating to valuation for the purpose of determining the amount of any fee, and it makes the decision upon this question final."

"We can see nothing in this Act which would lead us to suppose that the Legislative Council intended that these rules should be applied to the determining what was the value for the purpose of jurisdiction."

"Therefore the decree of the Lower Appellate Court must be reversed," and so on.

And this decision of the Division Bench was in truth almost the necessary consequence of the principle laid down by a Full Bench of the High Court in a case which is reported in the 16th Volume of the Weekly Reporter, page 10, Full Bench Rulings. The late Officiating Chief Justice, Mr. Norman, on that occasion stated the opinion of the Full Bench in these words:—

"We are of opinion that, whenever a plaint is rejected under the provisions of Section 30 of Act VIII of 1859, on the ground that the amount or estimated value of the claim as stated by the plaintiff is beyond the jurisdiction of the Court, an appeal is given by Section 36 from the order rejecting the plaint. We think clear that the provisions in the note to the Stamp Act XXVI of 1867, which was passed for a totally different purpose, namely, to prevent appeals upon questions of stamp-duty where the sole question is as to the amount of stamp to be impressed on the plaint, cannot have the effect of repealing by implication the provisions of the Code of Civil Procedure, which in clear and distinct terms give a right of appeal where a plaint is rejected upon the ground that it is undervalued. We think clear that whenever for the purpose of determining the question whether or not the Lower Court was right in rejecting the plaint upon the ground that it had no jurisdiction to entertain the suit, it becomes

"necessary to try what is really and truly the value of the property in suit, the Court which has to determine the appeal upon the question of jurisdiction has incidentally power to determine all those questions of fact which are necessary to enable it to arrive at a satisfactory determination on the question of jurisdiction. We think, therefore, that there is no doubt that an appeal to the Subordinate Judge lay in the present case, and for the purpose of determining that appeal the Subordinate Judge had the power to enquire into and determine the question of the value of the property in suit."

The decision of the Full Bench in that case, by which it was held that the question as to the value of the property for the purpose of jurisdiction was a question of fact open to appeal, while the question as to the value of the property for the purposes of stamp-duty was not open to appeal, but was a question to be finally decided by the Moonsiff under the terms of the Stamp Act in force, really seems to have had the effect of ruling that these two matters were essentially distinct—that valuation of the subject of suit for the purposes of the Stamp Act had been made by the Legislature a matter separate and different from the valuation for the purposes of jurisdiction; because it is at once obvious that, if the question relative to the one is open to appeal while the question relative to the other is not open to appeal, it might well enough happen, and would frequently happen, that in one and the same suit before the suit came to a final determination, the values of the subject of suit arrived at by the two processes of valuation would be very different in amounts. As the effect of these two decisions, it appears to us to have been made clear that the valuation which is to govern the jurisdiction of the Court is a perfectly distinct matter, as we have already said, from the valuation according to which stamps and fees are to be levied.

The present Act which limits the jurisdiction of the Moonsiff according to the valuation or amount of the suit, is the Act VI of 1871, the 20th Section of which runs in these words:—

"The jurisdiction of a Moonsiff extends to all like suits in which *the amount or value of the subject-matter in dispute* does not exceed one thousand rupees."

There is no provision in any part of the Act itself which goes to direct the mode in which *the amount or value of the subject-matter in dispute* is to be calculated. Precisely the same words were used in Act XVI, of 1868, which preceded the present Act VI of 1871. Section 13 of Act XVI of 1868 says:—"Moonsiffs are empowered to try all original suits cognizable by the Civil Courts of which the subject-matter does not exceed *in amount or value Rs. 1,000.*"

The words used in both these Acts are *amount or value*; and we have nothing whatever in either of these Acts to indicate that the Legislature intended the *amount or value* for the purposes of Moonsiff's jurisdiction to be assessed or estimated in any established or special manner. The result then, as it seems to us, is inevitable—the two decisions to which we have already alluded having put it beyond doubt that the special rules of the present Court Fees' Act and of the old Stamp Act were not intended by the Legislature for this purpose—it is inevitable that the Courts must in each case estimate *the amount or value* of the subject-matter in dispute for the purposes of jurisdiction by the aid of the best evidence available bearing upon the actual amount or value of that subject.

It appears to us further that this view of the case could be fortified by a consideration and discussion of the history, so to speak, of the Moonsiff's jurisdiction from the time of its first creation, if it were necessary that we should go into any detail on this subject. But we think it sufficient for our present purpose merely to point out the first of the two modern Acts to which we have just now referred as dealing with the jurisdiction of the Moonsiffs, namely, Act XVI of 1868, while it repeals Regulation V of 1831, by the appended schedule, makes a special reference to it as a Regulation extending the powers of the Moonsiffs, Sudder Ameens, and so on. It is thus clear, if evidence to this effect were wanted; that the Legislature at the time of the passing of Act XVI of 1868 had expressly under its notice the several provisions of Regulation V of 1831, and in actual view of them so to speak used the words for defining the Moonsiff's jurisdiction which we have already read out. But Regulation V of 1831 limited the jurisdiction of the Moonsiff in a very special and express manner:—while it raised the then existing jurisdiction of the Moonsiff to the

amount of Rs. 300; and also gave, we think, for the first time (though about that we are not quite sure) powers to the Moonsiff to entertain suits for immoveable property, it expressly enacted that the rules prescribed in existing Regulations with regard to the mode of computing the value of the property in litigation should be applicable for the purposes of computing the property in the case of Moonsiff's jurisdiction. Then, again, while that same Act created Principal Sudder Ameens and authorized the District Courts to refer to them original suits under 5,000 rupees, it directed that the value for this purpose should be calculated according to Schedule B of Regulation X of 1829, which was the Stamp Act then in force. And so also it directed that the amount which was to govern the jurisdiction of the Sudder Ameens should be calculated by the rules in the same schedule.

It seems to us exceedingly important in judging of the question which is before us that we find the Legislature when it used the words "*amount or value*" in the Act XVI of 1868 without further limitation or specification at all, had before it and under its notice the provisions of the Act which up to that time regulated the jurisdiction of the Moonsiff by express reference to the rules of the Stamp Act. We must take it, we think, that if the Legislature in framing the new Act, which was to replace the old Regulation in regard to the Moonsiff's jurisdiction, at that time refrained from directing that the value should be estimated according to the rules of the Stamp Act which might be passed from time to time, as had before been the case, it must have done so advisedly.

On the whole we are not prepared to differ from the decision of the Division Bench to which we have already referred, reported in 18 Weekly Reporter, page 109; and it follows in our judgment that we must give effect to the objection which has been made in special appeal.

It is admitted that there is no evidence upon which it can be sent back to the Lower Court with any chance of success for the plaintiff in regard to the reassessment of the value of the property. Accordingly the suit is dismissed for want of jurisdiction.

The plaintiff must pay the costs of the defendant in this Court and in the Lower Appellate Court.

The 7th May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Lease—Substituted Lease—Stamps.

Case No. 203 of 1872.

*Regular Appeal from a decision passed by
the Subordinate Judge of Tirhoot, dated
the 27th May 1872.*

Byjnath Dutt Jht and others (Defendants)
Appellants,

versus

Mussamut Patshee Dobain and another
(Plaintiffs) *Respondents.*

*Mr. C. Gregory and Baboo Aubinash
Chunder Banerjee for Appellants.*

Mr. M. L. Sandel for Respondents.

After a complete lease has been executed, stamped, and registered, if another document is prepared and executed with a view to alter the first, and substitute new terms so far as the rent is concerned, it requires, under the Stamp Act, to be itself stamped with the stamp provided for a lease.

Phear, J.—In this suit, the plaintiffs seek to recover from the defendant certain arrears of rent alleged to be due upon a kubooleut, which they say was executed by the defendant on the 7th July 1869.

The defendant's answer is, that true it is they executed this kubooleut, and that it was duly registered, but it never was intended by the parties that this document should express the agreement between them as to the amount of rent. They say that the rent Rs. 4,725, therein reserved was a fictitious sum put down only with a view to the document ultimately being used for a fraudulent purpose against ryots or in any other way, in which such an apparent agreement between these parties could be used by the plaintiff to his advantage. The defendants at the same time say that the real agreement, so far as regards rent, between them and the plaintiff was exhibited in an ikrarnamah which was executed on the 25th July 1869, that is, some eighteen days after the date of the first kubooleut.

Now we need not say that the position which the defendants thus take up is not such as to entitle them to much consideration at the hands of a Court of Justice. They defend themselves against the plaintiff's claim by alleging facts which amount to

fraudulent conduct on their own part of a very serious character. If they can be allowed to take this defence at all, it is at any rate quite clear that they must make out the allegations distinctly and without any manner of doubt. But really the evidence that they put forward in support of their case is of the most infirm description. The document which they say was executed on the 25th July 1869 bears only a one-rupee stamp, and is not registered. The Lower Court has, therefore, considered that it was not admissible in evidence.

It seems to us that the Lower Court was right in this respect. The document, if it really was genuine, and had the character which the defendants attribute to it, was an alteration of the terms of the lease. It is a memorandum or writing containing one, at any rate, of the terms upon which they held a farm of these mouzahs. It was consequently, under the express terms of the Stamp Act, in our opinion, a document which required to be stamped with the stamp provided for a lease. It is not merely a paper which is to be taken in connection with another paper that has already been stamped, in order to supply what is deficient in that paper, i.e., such that the two must be taken together in order to arrive at the agreement of lease which was *originally* come to. It is, according to the account which the defendants themselves give, a document which was prepared and executed after the first complete document had itself been executed, stamped and registered, with a view to *alter* that first complete document. It was then a substitution, so far as the rent was concerned, of certain new terms for the old terms, and clearly we think it required under the Stamp Act to be itself stamped with a stamp which is rendered necessary for a lease. On this ground alone the document is inadmissible in evidence.

But even if we go to the merits of the case, we must say that we entirely agree with the Subordinate Judge, though possibly upon different grounds, in thinking that the execution of this document is on no account made out by the evidence. Two witnesses are called to prove the execution. Neither one nor the other swears to the execution of that document by the plaintiff. Each one identifies his own signature on the document as a witness, but he does not swear to the signature of the executing party. More than this, both of them admit that one of the executing parties was a

pardah lady, and they had no means of knowing by direct observation whether or not she did in fact execute the document, and so far as they say that she did execute it, they only speak of it as a fact learnt from information obtained by them.

Then these witnesses are entirely silent as to the causes which led to the second document being drawn up and executed. There is no witness on the record who deposes to the facts which are necessary to make out the defendant's case. There is no one brought before the Court to state what took place when the original pottah and kubooleut were executed. There is nothing whatever in the evidence to show us that the allegations which the defendant makes with regard to the purpose for which the original documents, pottah and kubooleut, were drawn are in certain degree true. We repeat that the charge which the defendants make against the plaintiff in this respect is one of so serious a character that it requires to be made out with the utmost distinctness, by evidence of what actually occurred, such as should leave no reasonable doubt upon our mind.

As to the latter part of the case, namely, that part in which the defendants endeavour to make out that four sums of money were sent by them to the plaintiff as payments in respect of rents, amounting together to 1,461 rupees, for which they say the plaintiff has not given them credit, it seems to us also to break down as well as the first part. In fact the first of these four items is not spoken to at all. The other three items are spoken to by men, who according to the description which they give of themselves, are not persons who would naturally be expected to be able to speak to them. The amlah of one mouzah curiously enough carries the money which is due in respect of another mouzah. There is no one to tell us in any one of these cases how that remarkable arrangement came about. Each of them also says that receipts were given him at the time when he paid in the money by the gomastah of the plaintiff. We have been told that there are receipts of this kind filed in this case, but not one of these witnesses actually speak to the receipts: nothing of the sort is put into his hands and identified by him.

On the whole, it is quite clear, as we have said at first, that the evidence by which the defendants have sought to establish their case is of the weakest possible character. The Subordinate Judge has put no trust in

it, not in any part of it, and it appears to us that he was entirely right in his estimate of it.

We think the appeal must be dismissed with costs.

The 7th May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Hindoo Law—Mortgage by Guardian of Ancestral Property—Legal Necessity—Minor's Liability.

Case No. 212 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 20th June 1872.

Radha Pershad Singh (Plaintiff) *Appellant,*

versus

Mussamut Talook Raj Kooer (Defendant)
Respondent.

Baboos Mohesh Chunder Chowdhry and Romesh Chunder Mitter for Appellant.

Baboos Unnoda Pershad Banerjee and Chunder Madhub Ghose for Respondent.

Under Hindoo law a contract made by a guardian without authority cannot bind the minor.

Even if it is desirable that a minor should have any benefit, such as increase to a very small income, from some undertaking or enterprise, e.g., obtaining a lease of certain rents, that circumstance is not sufficient to constitute a necessity for the mother and guardian to mortgage the minor's ancestral property with a view to secure such benefit.

Phear, J.—In this suit, the plaintiff says that his father, from whom he inherits the property, leased certain rents to the first defendant, who is mother of the second defendant and was his guardian at the time when the lease was granted, for the use of and on behalf of the second defendant, then a minor; that she at the same time executed an ikrarnamah, by which she hypothecated certain

property belonging to the minor as security for the due payment of the rents reserved in the ticca lease. The plaint goes on to say that these rents have fallen into arrear, and the plaintiff sues to recover the amount due in respect of the arrears, and seeks to sell the property which was mortgaged to secure the payment of them.

When the plaint was filed, the first defendant only was sued as the mother and guardian of Kishen Pershad Singh, her minor son. So that, according to the plaintiff's own view, the defendant Kishen Pershad Singh was certainly up to the time when the suit was brought a minor. During the pendency of the suit it seems that he has become a major. He has intervened, and in that way has been allowed to become personally a party on the record as second defendant.

In this state of the case, the trial has been had in the Court below, and a decree has been given in favor of the plaintiff against the first defendant personally, but the suit has been dismissed as against Kishen Pershad Singh, the second defendant. Against this latter part of the decision, this appeal is brought by the plaintiff.

The defendant Kishen Pershad Singh now says for himself that this transaction of lease and the mortgage of his property effected by his mother were made while he was a minor, and while also an elder brother of his was a minor, after the death of their father, and that he was not bound by this transaction.

It seems to us that this defence is a good defence. There is no question in the case as to the minority of the defendant at the time when the lease and the ikrarnamah were executed. The only question is whether they were executed under such circumstances as were sufficient to render the act of the mother valid to bind her infant son as his property.

Now we need not say that nothing more plain under the Hindoo law than that a minor cannot make a contract for himself, and no one can make a contract which shall bind him and his property unless he has authority under the law to do it. There is no cause of authority shown to us which existed at the time when the mother took the lease and effected the mortgage—no authority on her part to bind the son. The transaction took place undoubtedly after the Act of 1858 was in operation: and although

the mother pretended to act as guardian of the minor, she certainly did not get the authority for making the mortgage which that Act prescribes.

But it has been urged before us that there was something in the shape of necessity in this case which of itself was sufficient to give her authority to do that which she did. We must say that we found it very hard to understand the nature of the necessity. The lease of the rents, no doubt, was in the nature of that which in England would be termed a *beneficial lease*, and it was no doubt supposed at the time that the profits of the lease which would accrue to the tictadar would be considerable. And inasmuch as the minor's income was, when this was effected, very small, it is now said that there was something in the shape of a necessity on the part of the mother to procure the increase of income in this way. That is pretty much the same thing as saying that it was incumbent on the mother to engage in some undertaking or enterprise which should serve to add to the income of the minor. But that is very different in our mind from the sort of necessity which is contemplated by law as sufficient to give authority to a guardian to bind the minor. And then, even on the particular facts of this case, it seems from the testimony of the plaintiff's own witnesses that this particular property, which was leased, was of such a character as made it extremely problematic whether the lessee would be benefited or not. The plaintiff's father, it is said, was reluctant to grant the lease, because he thought it would get the minors into trouble, and would be the cause of destroying instead of increasing the minor's estate. And it is precisely this very thing which in fact has happened. And certainly even if it was desirable that the minor should have any benefit which could be got from this lease, this was not sufficient to constitute a necessity for the mother to mortgage the minor's ancestral property for the purpose of securing the payment of the rent. If she could not get the lease on any other condition than that, it does not appear to us that was any real necessity for her getting it at all.

On the whole, we think that the plaintiff has entirely failed to show that there was any necessity, or any state of facts which served to give authority to the mother to bind her minor son in this matter. The result is, we think, that the decision of the Court below was right, and that this appeal must be dismissed with costs.

The 7th May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble C. Pontifex, *Judge*.

Suit against Executor—Liability of Testator—Trust Property—Beneficial Interest.

On Appeal from the judgment of the Hon'ble W. Markby exercising the Ordinary Original Civil Jurisdiction of the High Court.

Debnarain Bose (one of the Defendants)
Appellant,

versus

Sreemutty Comulmonee Dossee (Plaintiff)
and another (Defendant) *Respondents.*

The *Advocate-General* and Mr. Montriou
for the Appellant.

Mr. Woodroffe and Mr. Evans for the
Respondent Sreemutty Comulmonee Dossee.

Mr. Kennedy for the Defendant-Respondent.

K died, leaving a will, which directed, among other dispositions of her property, that her executors should collect the rent of a house belonging to her, and, after payment of revenue, taxes, and other expenses, should lay out every month Rs. 30 for the worship of a thakoor, and should enjoy what remained in equal shares during their lives. One of the executors, B, having been sued by one of the legatees, because he had not paid one of the legacies under the will, a decree was made by consent, in execution of which the right, title, and interest of B in the said house were sold by the Sheriff and purchased by D, who was put in possession of the whole house. The other executor, who proved the will subsequently to B's having done so, then brought a suit against D, praying that the will might be construed, the rights of plaintiff and defendant ascertained, and the portion she might be entitled to decreed:

Held, that the intention of the decree against B was to make the costs payable, not by the estate of the testatrix, but by B himself, and the execution-sale was valid so far only as it conveyed such beneficial interest in the house as he took under the will.

Held, that the property was not a mere gift to the executors subject to a charge, but a trust, and that B's interest was in the surplus rents and profits after satisfying the purposes of the will.

THE following was the judgment of the Lower Court:—

Markby, J.—If it was necessary for me to decide some of the very difficult and important questions which have been raised and discussed in the course of the hearing of this suit, it would have been necessary for me to take time to consider my judgment. But so far as appears to me at present, the questions on which my decision will have to turn are of an extremely simple character,

and do not present any difficulty. The suit, so far as any question which has been raised by the parties for decision, relates to a property which is described in the will as No. 318 Chitpore road, but which is in fact now numbered 393. Now it appears that this house, with other property, formerly belonged to one Khettermonee Dossee, and that she made her will, by which she devised to thakoors, which she had made in her family dwelling-house, this dwelling-house and the land thereto belonging, and then she appoints Sreemutty Comulmonee Dossee, her sister, who is the plaintiff in this suit, and Balgobind Burmono, the son of another sister, executrix and executor of the will; and she appoints these two persons, and the survivor of them, shabaitis of the thakoors, and after the death of both of them, the male issue of Balgobind Burmono, or in default thereof, the adopted son and the heirs of such adopted son to be shabaitis, and their duties as such shabaitis are partly set out. Then by the 3rd clause, she directs that the said executrix and executor shall collect the rents of the house No. 318 Chitpore road, and that after payment of the revenue and taxes and also the expenses of repairing the other house which was devised to thakoors, then in the first place to lay out the sum of Rs. 30 monthly for the sheba of the thakoors. Then there is something in the nature of what I may call a devise over, which so far as I see at present it is not necessary for me to consider. It appears that only one of these persons, Balgobind Burmono, proved the will, and he alone, for a considerable period, administered the estate. Subsequently Comulmonee got probate, as late as 8th August 1872. Prior to that, viz., on 17th August 1871, a decree was made in a suit which was brought by Sreemutty Jogendranee Dossee against Balgobind Burmono, in which suit Balgobind Burmono is not in any way described as executor or trustee or representative of the deceased, but is apparently sued in his own proper person. It appears by the decree that that suit was for administration of the estate of Sreemutty Khettermonee Dossee, deceased, and if necessary for the appointment of a receiver. That is the short description of the suit which is given in the decree, but no decree either for administration of the estate or for the appointment of a receiver was ever made. All that was done in that suit was that a decree was given simply against the defendant Balgobind Burmono, with the consent of the plaintiff and of the defendant by their respective counsel, that he, the defendant, should pay

to the said plaintiff the costs of the suit, including the costs of the written statement, to be taxed by the taxing officer of the Court under heading Class I, short causes. It appears that those costs were taxed at the sum of Rs. 400-7, and that on the 26th September 1871 an application was made to the Court for a writ of execution for that amount. In the schedule, which is usually filed upon such an application, the defendant is described, not in the way in which he is described in the plaint and in the decree, but as "Balgobind Burmono, executor to the estate of Khettermonee Dossee, deceased, and under the heading which states the mode in which the assistance of the Court is sought, attachment is asked "of the house and premises No. 398 Machooa Bazar, Chitpore road, in the town of Calcutta, now in the possession of the defendant as executor to the estate of Khettermonee Dossee, deceased;" and upon that a prohibitory order was issued directing the defendant not to alienate the property specified in the schedule, which is described as being in the possession of the defendant as executor to the estate of Khettermonee Dossee, deceased. For some reason or other, owing probably to there being an error in the number of the premises, that was not proceeded with, and another application for a writ of execution was made. There, under the heading of the name of the parties, the defendant is again described as Balgobind Burmono, executor to the estate of Khettermonee Dossee, deceased, and the attachment is "of the house and premises No. 393 Machooa Bazar, Chitpore road, in the town of Calcutta, in the possession of the defendant as executor to the estate of Khettermonee Dossee, deceased." A writ was issued in the same words as before, prohibiting the defendant from parting with "the house and premises No. 393 Machooa Bazar, in the town of Calcutta, belonging to the estate of Khettermonee Dossee, deceased, which is now in the possession of the defendant as her executor." In the order of the Court confirming the sale, it is ordered "that the sale by the said sheriff in execution of the decree in this suit of the right, title and interest of the above-named defendant Balgobind Burmono, executor of Sreemutty Khettermonee Dossee, deceased, of in and to the house and premises No. 393 Machooa Bazar in the town of Calcutta, belonging to the estate of Sreemutty Khettermonee Dossee, deceased, and which is now in possession of the defendant as her executor, to the plaintiff Narain Bose for Rs. 550 be confirmed."

a certificate under Section 259 of Act VIII of 1859 be granted to the said Debnarain Bose as the purchaser of the right, title, and interest of the said Balgobind Burmono as such executor as aforesaid of in and to the property aforesaid." Now it is obvious upon that statement of these proceedings that there is this manifest error, that in a suit brought against the defendant in his own proper person in which nothing appears to have been adjudicated upon by the Court, but there was only a consent decree given against the defendant making him in his proper person liable for costs, an execution has issued against that same defendant describing him as executor, and property, not his own, but which he holds as executor, has been ordered to be sold. I do not think it requires much argument to show that that cannot be done. A decree against a defendant personally, which he would be required to satisfy out of his own proper assets, is to my mind as distinct from a decree against that person as executor to be satisfied out of property in his hands as executor, as a decree against one man is from a decree against another. It may be said that this has been done under the orders of two successive Judges of the Court, but I feel satisfied that it was not brought to the notice of either of those learned Judges that there was that important difference between the decree and the execution which was sought to be levied on it. I think that it is in the last degree doubtful whether any Judge would issue a writ of execution against an executor, and direct money to be levied out of property which he holds as executor under a decree which was given against him personally. If, however, there might be any conceivable state of circumstances in which that could be done, it is certain, to my mind, that no Judge would have done that without bringing it on record that that had been brought to his notice, and that he had ordered it to be done. In the absence of any such statement on the record, I think I must assume that the difference between the application for execution and the decree was not brought to the notice of the Court, and that the execution issued in its present form *per incuriam*. I do not go so far as to say that there was any misconduct in the matter, but there was in the misrepresentation made to the Court, and the whole of the proceedings in execution so far as they attempt to touch any property which the defendant held as executor, are absolutely void.

Then it is said that, even if these proceedings are void so far as the interest which

Balgobind Burmono may have held as executor is concerned, still they are good for any interest which he may have beneficially in this property. Now I am by no means prepared to say that Balgobind Burmono has not some beneficial interest, nor is it necessary for me to say now whether under proper proceedings taken that beneficial interest, either by execution properly taken or by any other means, can be made available for the debts of Balgobind Burmono. But I think it perfectly clear, when a creditor attaches property and brings it to sale, and property is sold and a certificate is given that the property so sold passed to the purchaser, that that can affect that property and that property alone; and you can not say that the defendant had some other property which was not attached, which was not sold, and which was not included in the certificate which passed to the purchaser. The property which was attached and which was sold on this occasion was the house No. 393 Machooa Bazar, belonging to the estate of Khettermonee Dossee, and which was in the possession of the defendant as her executor. I think it is impossible to say that the plaintiff in the former suit, Sreemutty Jogen-drane Dossee, either intended to attach or sell, or that she did attach or sell, or that the purchaser intended to purchase or that he did purchase, any other interest than that described in these documents. The only doubt which has occurred to me on this part of the case is whether it makes any difference that Balgobind Burmono is not the plaintiff in this suit, and is not asserting any right whatever under the will as he has not appeared and is not represented before me, and whether without going further and ascertaining exactly what the positions of the parties are under the will, I can say that the plaintiff has any *locus standi* to raise the question which Balgobind Burmono, if he had been here, could have undoubtedly raised. I think on consideration she has. We must take it for the purposes of this suit that this was a valid bequest. It is I think clear that if this bequest altogether fails, the defendant has no title; for in either view he bases his title upon the bequest. Nor do I think it necessary to consider whether, under the law as it now stands, the intention of the testatrix can be fully and effectually carried out. It is apparent that the intention of the testatrix, whether that intention can be fully carried out or not, was that this property should remain in her family, and whether she can do so effectually or not the plaintiff in this suit

is bound, in order to carry out the duties which are imposed on her under this clause of the will, to keep out, if possible, from the possession of these houses any person who is a stranger to the family. The clause directs that these two houses, one of which is dedicated to what are called religious purposes, but which are rather family purposes, should, after the payment of all taxes, &c., be kept in repair, and Rs. 30 a month should be laid out in the worship of the idol. It is impossible to suppose (whatever may be the ultimate result of this devise) that the intention of the testatrix was that the duty of repairing these houses and laying out this monthly sum should be performed by any one who is not a member of her own family. It would materially interfere with the performance of those duties that the defendant Debnarain Bose should have a right to joint possession with the plaintiff of the dwelling-house, the profits of which have been so appropriated. I think, therefore, that under the ordinary performance of her duties as executrix, the plaintiff has a right to insist, before any person can interfere in the possession of this house, on his showing that he has a strict right to do so. I am, therefore, of opinion that whether the defendant seeks to establish his rights as the owner of any interest which was vested by the will in Balgobind Burmono as executor, or as the owner of any interest which Balgobind may have had under the will beneficially for himself, he has equally failed, and that the plaintiff in this suit has a right to insist on that failure, and accordingly so far this suit must be decided in her favor. I declare that the defendant took no interest in this house under his purchase as against the plaintiff or the infant defendant Bejoy, and it must be declared that the plaintiff is entitled to possession of the house as against the defendant Debnarain Bose and all persons claiming by through or under him.

I make no further declaration at all as to the rights of the minor. The defendant Debnarain Bose must pay the plaintiff's costs of suit on scale No. 2. The plaintiff must pay the costs of the infant defendant on the same scale, but will recover those costs, when paid, from the defendant Debnarain Bose.

The defendant, Debnarain Bose, appealed from this decision for the following reasons:—

1st.—Because the learned Judge is in error in treating the suit of Sreemutty Jogen-drahee Dossee against Balgobind Burmono as a suit against him personally, inasmuch as the said suit was plainly and necessarily against him in his capacity as representative

of Sreemutty Khettermonee Dossee, and as executor of her last will, and to obtain payment of a legacy from and out of the estate and assets of the said Sreemutty Khettermonee Dossee.

2nd.—The learned Judge is in error in treating and considering the decree by consent made in the said suit as against the said Balgobind Burmono personally in the first instance, or at all, inasmuch as it sufficiently appears by the record of the proceedings in the said suit that the said decree was against the assets of the said Sreemutty Khettermonee Dossee in the hands of the said Balgobind Burmono as executor of her last will.

3rd.—The learned Judge was in error in holding and treating the proceedings in execution in the said suit as illegal or void or irregular, the said execution being in conformity with the record of the suit and with the decree therein, and not being amendable at all, and much less subject to correction or to be set aside in this suit in which this appeal is made.

4th.—The learned Judge is in error in his opinion that, if this Hon'ble Court has jurisdiction in the present suit to annul, and has properly annulled, the said execution and the said sale under it of the title of the said Sreemutty Khettermonee Dossee, deceased, to No. 393 Chitpore road, because the said execution should have been in respect of the title and interest therein and thereto of the said Balgobind Burmono personally, this Hon'ble Court has not, consequently and under the circumstances of this case, now in appeal, full power and jurisdiction to treat the said sale in execution as a sale of the title and interest of the said Balgobind Burmono (whatever be that title and interest) in and to the premises No. 393 Chitpore road.

5th.—That the decree hereby appealed from is inequitably with the appellant as a purchase for consideration under a sale (in the ordinary course and finally confirmed) in execution of a decree and process of this Hon'ble Court, and that no sufficient ground is laid out as a reason assigned for the declaration that the appellant took no interest under his purchase.

The judgment of the Appellate was delivered as follows by—

Couch, C.J.—In this suit the case of the plaintiff was that one Sreemutty Khettermonee Dossee, who died about the year August 1861, left, amongst other property, a house and premises, formerly No. 393 Chitpore road, but at the time of her death

the suit, No. 393 ; and that she made a will, by which, amongst other dispositions of her property, she directed that her executrix and executor, the plaintiff, who was her sister, and Balgobind Burmono, should collect the rent of the house in Chitpore road, and, after the payment of the revenue and taxes, and the expenses of repairing the house and the revenue, taxes, and expenses of repairing another dwelling-house, No. 14-6 in Chitpore road, of which she had made a disposition by her will, should lay out Rs. 30 monthly and every month for the sheba of the thakoor mentioned in the will, and should take and enjoy what should remain after satisfying these purposes during their lives in equal shares ; and in case of the death of either of them, the survivor should take and enjoy the whole during her or his life, and after the death of the survivor, the male issue of Balgobind Burmono or other the sebaite for the time being of the thakoor, should take and enjoy the house, and collect the rents and profits upon the trust and for the purposes before-mentioned.

The plaintiff stated that Balgobind Burmono alone proved the will, but that subsequently she had proved it, and she then stated that one of the legatees under the will, Jogendranee Dossee, brought a suit against Balgobind Burmono and obtained a decree, and in execution of it caused the house and premises to be attached, and the right, title, and interest of Balgobind Burmono to be sold ; and that the defendant Debnarain Bose purchased the right, title, and interest for Rs. 550. She then alleged that the purchase had been confirmed by an order of this Court, and the defendant Debnarain Bose had been put in possession of the whole house, and prayed that the will of Khettermonee Dossee might be construed, and the rights of the plaintiff and the defendant to the house and premises or the surplus rents and profits thereof ascertained, and that possession of the house, or such portion thereof as she might be entitled to, might be decreed to her. The prayer went on to ask for other matters which need not be noticed. The defendant Debnarain Bose in his written statement alleged that the sheriff of Calcutta sold by public auction in execution of the decree the right, title, and interest of Balgobind Burmono as executor of Sreemutty Khettermonee Dossee in the house and premises. He set out in his written statement an order for the sale, where it is said that it was the right, title, and interest of Balgobind Burmono as the executor of Khettermonee

Dossee, and alleged that he became the purchaser of the right, title, and interest of Sreemutty Khettermonee Dossee in and to the said premises possessed by the said Balgobind Burmono as her executor as aforesaid. He then set out the order confirming the sale, where it is described as a sale of the right, title, and interest of the defendant Balgobind Burmono, executor of Sreemutty Khettermonee Dossee, and alleged that upon the certificate of the sale being given, which was a certificate that he had purchased the right, title, and interest of the above-named defendant, Balgobind Burmono, executor, that he was duly put in possession by the sheriff, and he has ever since been in possession.

The first question in the case is, what was sold in execution of the decree ; whether, as the defendant alleges, the right, title, and interest of Balgobind Burmono in the house as executor, or, as described in another part of his written statement, the property of the testatrix in the possession of the executor, who at that time was the only one who had proved the will.

Now the decree under which this property was sold was made in a suit between Jogendranee Dossee, the legatee, and Balgobind Burmono. The present plaintiff was not a party to it, and the decree states that it was ordered and decreed by and with the consent of the plaintiff and the defendant by their respective counsel that the defendant do pay to the plaintiff the costs of the suit, including the costs of the written statement, to be taxed, &c. In considering what was the intention of the Court in making this decree, it is proper to look at the fact that it was a decree by consent, and the parties to it who consented to it had no power to bind the plaintiff or the estate of the testatrix to pay the costs of a suit which was brought against Balgobind Burmono, because he had not paid one of the legacies under the will. The language of the decree in its ordinary meaning is not that the costs were to be paid out of the estate in the hands of Balgobind as executor, but by himself. I think, looking at the nature of the suit, its being a decree by consent, and at the language of it, there can be no doubt that this was intended. I do not believe that if the learned Judge who made this decree had been informed that the object of the parties was to make the estate of the testatrix liable for the costs of the suit, he would have allowed them to take any such decree.

That being the nature of the decree, it

would not authorize a sale of the right, title, and interest in the house and premises of Balgobind Burmono as executor of the deceased. But I think we may hold the execution and sale proceedings to be valid so far as the decree would authorize them. We may reject the words, which seem to have been put in in the application for the attachment, describing the property in his possession as executor and calling him executor, and treat the execution as what the law would authorize; a seizure and sale of such beneficial interest in this house as Balgobind Burmono took under the will.

Then the question arises what interest did he take? Mr. Montriou argued that this gift or bequest of the house was a gift to these two persons, subject to the charge of Rs. 30 a month, and of the revenue, taxes, and repairs of the other house. I think that is not the way in which this will should be construed. The only way in which the intention of the testatrix can be carried out is by construing this as a gift to these two persons in trust to perform the various duties which are specified in that part of the will, and a gift of a beneficial interest in what might remain of the rents and profits after these purposes had been carried out. The language of the will shows that this was the intention, because the gift or bequest concludes with "the sebit for the time being of my said thakoor shall take hold and enjoy the said three storied tenanted house, and collect the rents thereof upon the trusts and for the purposes hereinbefore mentioned." I have no doubt that this must be considered as a trust, and not a mere gift of the property subject to a charge; and that being the case, the beneficial interest that Balgobind Burmono took under the will was an interest in the surplus rents and profits after the purposes which are mentioned had been performed, and the expenses which the trustees were to incur had been paid. That is a beneficial interest which might have been attached and sold. Therefore the decree made by the learned Judge, which declares that Balgobind Burmono had no interest whatever, must be modified. The plaintiff in her prayer asks that the interest may be declared; and it would be proper for us to declare what beneficial interest there was that might have been taken and sold. In that way, we shall modify this decree.

Then we have to consider the question of costs. The infant defendant, for whom Mr. Kennedy appeared, ought not to have been made a party to the suit. It was quite

unnecessary to do so, and the plaintiff having unnecessarily made him a party to the suit ought to pay his costs of the hearing before Mr. Justice Markby. But with regard to his costs of the appeal, it was not necessary for him to appear. He has chosen to do so when there was no necessity for it, and therefore he ought not to be allowed any costs of the hearing on the appeal. As to the other parties, we consider the modification of the decree is not such as entitles the appellant to the costs of the appeal because he has failed as to the case which he put forward in his written statement and upon which he relied at the hearing. Therefore we think that the plaintiff and the defendant Debnarain Bose ought to bear their own costs respectively of the appeal; but the plaintiff is entitled to the costs of the original hearing and of any enquiry that may be necessary in taking the account of the rents and profits.

Pontifex J.—I concur.

The 7th May 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock,
Sir Montague E. Smith, Sir Robert P.
Collier, and Sir Lawrence Peel.

Burden of Proof—Julkur—Rights of Auction-purchaser—Tenure created before the Perpetual Settlement—Local Investigation—Delegation of main Point in Dispute to an Ameen.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Forbes

versus

Meer Mahomed Hossein.

Where an auction-purchaser brought a suit to obtain possession of certain julkurs, which he alleged formed part of his zemindary of S, the defendant being in possession thereof, and his possession having been affirmed in an Act IV case, HELD, that the burden of proof rested on the plaintiff to show that the julkur dispute formed part of the assets of the zemindary at the time of the perpetual settlement; and also that the plaintiff not having objected before the High Court to the Court of first instance having delegated the decision of the main point in the case to an Ameen, could not take that objection before the Judicial Committee.

THIS was an appeal from a judgment of the High Court of Calcutta, dated the 31st of March 1865, affirming a decree of the Principal Sudder Ameen of Zillah Purneah.

* From the judgment of Bayley and Phear, JJ., in Regular Appeal No. 325 of 1864, decided 31st March 1865.

dated the 26th of May 1864, and dismissing the suit with costs.

In addition to the facts of the case referred to in the judgment of the Judicial Committee, it may be stated that the question was whether certain julkurs formed part of the assets of the zemindary of Sultanpore, which the plaintiff claimed as assignee of the rights of an auction-purchaser, or whether they were a parcel of an istemrree holding of the respondents. The respondents had been in possession for a long period of years, and having been ousted by the plaintiff had recovered possession by Act IV proceedings. Neither the settlement of the zemindary with the plaintiff's predecessor in title, nor the sunnuds of the respondent's predecessors in title, contained any mention of the julkurs in dispute. None of the witnesses were examined before the Principal Sudder Ameen, who had ordered a local investigation by an ameen, and had directed the ameen, among other things, to ascertain in whose possession the julkurs in dispute were at or anterior to the decennial settlement. The ameen's report contained the following passage:—"From the depositions of the neighbours produced by the defendant, who spoke from their own knowledge, and from information derived from their ancestors, it appears that Meer Syud Ally, the ancestor of the defendant, was, anterior to the decennial settlement, having acquired the istemrar, in possession of the julkurs in dispute."

In the memorandum of appeal to the High Court no objection was taken to the ameen's report.

Mr. Leith, Q.C., and Mr. Bell for the appellant contended (1) that the burden of proof was on the respondent (*Wise v. Bhoomoyee Dossia Chowdrain*,* 10 Moore's Indian Appeals, 165); (2) that even if the burden of proof were on the appellant, there was no evidence to support his case; (3) that the Principal Sudder Ameen acted irregularly in delegating the decision of the main question in the case to an ameen. [Sir J. Colvile said that as this objection had not been taken before the High Court, their Lordships could not entertain it.]

Mr. John Cutler for the respondent was not called upon.

Sir J. Colvile delivered the following judgment:—

The appellant in this case is the zemindar of Sultanpore. Sultanpore, though now a separate zemindary, appears to have been at

the time of the decennial settlement part of a larger estate called Pergunnah Havilee, which was then settled with a lady, styled Ranees Indrabutty. When the separation took place does not very clearly appear, but what is clear is that, in the month of July 1850, Sultanpore was put up for sale for arrears of Government revenue; that it was then purchased by one Protap Singh; and that in the following April he sold it to the appellant, who thereby acquired all the rights which by virtue of that auction-purchase had been vested in the vendor.

The respondents may be taken to represent the holders of an istemrree or jageer tenure which, at the time of the perpetual settlement, existed under a grant or sunnud from the Government, but was then settled as part of Havilee, or, as one may take it, of Sultanpore in the nature of a dependent talook. It appears that, shortly after the auction-purchase, Mr. Forbes found that the holders of this tenure, which is admitted to be a tenure which he as auction-purchaser has no right to destroy, inasmuch as it existed before the decennial settlement, were in possession, and had long been in possession of certain julkur or rights of fishery. He seems to have attempted by the strong hand, or otherwise, to dispossess them of those fisheries; but on their suit, the Magistrate by an order dated the 4th December 1852, and made in an Act IV case, affirmed their possession, and on appeal that order of the Magistrate was confirmed by the Sessions Judge on the 9th April 1853.

It further appears by the proceedings that these julkurs, or rights of fishery, are of several kinds. Mr. Justice Phear, in his judgment, says:—"The most important of them is a river, which, for portions of its course, lies wholly within lands of the plaintiff, and for other portions wholly within the jageer or istemrree lands of the defendant; and thirdly, in other parts, divides the lands of the plaintiff and defendant." There seem to be also some which do not strictly fall within either of the above descriptions. I mean those which are connected with the Seetadhar stream, and partially, at least, consist of rights which during the time of flood are exercised over the appellant's admitted land.

It does not, however, appear to their Lordships to be necessary, at present at least, to examine very particularly into the distinction between these different rights of fishery, because if the Act IV proceeding which has been referred to, and which is found at

* 3 W. R., P. C., 5.

page 10 of the record, be examined, it will be found that they were all then in question—that the respondents were then found to have been in possession of all of them for a long time anterior to the dispute; and it is even stated in the judgment of the Sessions Judge that the defendant did not deny that possession in fact. They appear to have been all claimed by the respondents as held by the same title, that title being that they had been so held from a date previous to the decennial settlement, and, as an incident, to the tenure of which it is admitted the respondents or their ancestors were the undoubted holders. The right of possession, or the fact of possession, having been thus found by the Act IV proceedings, Mr. Forbes took no steps to impeach that finding until the year 1860, when he instituted this suit.

Now the first question which their Lordships have to determine is whether the Indian Courts have been correct in throwing upon the appellant the burden of showing that the julkurs which he claimed by his plaint formed part of the assets upon which the settlement of his zemindary was made? For that purpose it seems necessary, although the thing is common learning, to go back to first principles, and to consider upon what the stringent rights which the law gives to a purchaser at an auction-sale really rest.

It cannot be disputed that, if there had been no auction-sale, it would have been impossible for the zemindar to question, at the time this suit was brought, either the possession or the title of the respondents. There had been, in the year 1844, a previous Act IV case between one of the former zemindars and these parties, in which, as in the later proceeding of that kind, the possession of the respondents had been affirmed, and, of course, after that it would have been essential for the zemindar to prove that, within twelve years of bringing his suit, he had been in possession of those julkurs, and at the time this suit was brought, twelve years had elapsed even from the date of the award of 1844.

It is conceded that, by virtue of the purchase from the purchaser at the auction-sale, immediately after the sale, and at a time when he cannot be taken to have waived any rights which that transaction may have given him, Mr. Forbes, the appellant, acquired the same rights which he would have acquired had he been the actual purchaser at the revenue sale. But what are those rights? The first is no longer here dis-

puted: It is that, in the case of an auction-purchaser, the cause of action must be taken to have first arisen at the date of the purchase, and consequently that the defendants cannot plead their long possession as an absolute bar to the suit. The statutory title, however, which the law gives to an auction-purchaser, is that, for the protection of the revenue, and in order to ensure its due payment by him, and to avoid the necessity of repeated sales of the property, he is remitted to all those rights which the original settler at the date of the perpetual settlement had; and may, in consequence of that, sweep away or get rid of all the intermediate tenures and incumbrances created by preceding zemindars since that date. In the assertion of this right, the auction-purchaser is, no doubt, in many cases allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burden of proof on his opponent. That presumption, however, is founded not so much upon the principle which I have just mentioned, as upon the principle that every beegah of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions, and that the right of the zemindar to enhance rent is also presumable until the contrary is shown. Accordingly, in many cases which may be found in the books, a very heavy burden of proof has been placed upon the defendants whose tenures have been questioned by auction-purchasers; and they have had to prove, in circumstances of great difficulty, that their tenure did really exist at the date of the perpetual settlement or even twelve years before, in order to escape the consequences of the claim.

It is, however, to be observed that the course of modern legislation, and also modern decision, has, if not in the case of lakheraj lands, at least in the case of un-tenanted lands, to a considerable degree modified the rules laid down in the earlier cases, by giving force to the contrary presumptions arising from proof of long and undisturbed possession. In the present case the respondents are admitted to have given proof of possession for a period of nearly fifty years. But, if they had not done so, this particular case would, in their Lordships' opinion, stand clear of the presumptions which the appellant invokes in his favor; for the respondents are claiming these julkurs, or rights of fishery, as an incident to a tenure admitted to be incapable of being disturbed by the zemindar, a tenure which existed before the

date of the perpetual settlement. The question, therefore, resolves itself into one of parcel or no parcel,—whether the julkurs are parcel of the old estate of the under-tenant, or whether they have been granted by an act of the zemindar for the time being subsequent to the perpetual settlement. Therefore, it seems to their Lordships that there is nothing to relieve the appellant from the ordinary rule which the law imposes on a plaintiff, namely, that of establishing his own title affirmatively, and indeed of making out a strong title in order to disturb a possession of very long duration. Their Lordships are, therefore, of opinion that the Courts below were right in holding that the burden of proving that these julkurs did form part of the assets upon which the settlement was made, and that his means of meeting the revenue had been diminished by the alienation of them by means of acts subsequent to the date of the perpetual settlement, lay upon the appellant. It remains to be considered whether they were also right in holding that he had failed to establish that case. The distinction between the different classes of julkurs in dispute has already been noticed; and it may be admitted that, although the respondents would presumably have the right of fishing in waters lying wholly within the limits of their dependent talook, they would not presumably have the exclusive right of fishing in the waters dividing their lands from those of the appellant, or any right of fishing in places wherein the property in the soil is wholly in the appellant. The proof, however, of the long possession of the respondents applies equally to all the julkurs claimed. And that julkur, the right of fishing, may exist in India as an incorporeal hereditament and a right to be exercised upon the land of another, is shown by the case of *Lutchee Dasse v. Sitima Beebee*, reported in the second volume of the *Sudder Dewanny Adawlut Reports*, at page 51. In that case A had purchased at a public sale by the Collector a julkur of certain jheels. One of them was dry, and it was determined that A's purchase of the julkur only did not convey any property in the lands, which belonged to the proprietor of the jheel. But the julkur was held, so long as the land was covered with water, to exist as a separate right, and a right belonging to the purchaser. The case went through all the Courts, and was ultimately decided by high authority; for it was decided by the Sudder Court with the concurrence of Mr. Colebrooke.

Again, the issue to be established by the appellant was purely one of fact. It was first tried by the Principal Sudder Ameen, who dismissed the suit and found in favor of the respondents, and that after a local investigation. The cause then went by appeal to the High Court. The High Court thought that some further light might be thrown upon the question by the production of certain documentary evidence, and remanded the suit for retrial on that ground. It was retried, and the Principal Sudder Ameen again found in favor of the respondents. There was then a second appeal to the High Court, and both the learned Judges who formed the Division Bench of the High Court thought that there was no ground for disturbing the decision of the Principal Sudder Ameen. Therefore there has been a complete concurrence of all the Courts which have dealt with this case in India in favor of the respondents, and against the contention of the appellant. It has been urged, however, upon their Lordships that the High Court in particular has mistaken the effect of two documents, namely, a copy of the quinquennial register and the return of the surbarakar during the time in which the Pergunnah Havilee or Sultanpore was in the custody of the Court of Wards. But it appears to their Lordships that the learned Judges of the Court below addressed their minds to those two documents, and were satisfied that they failed to establish the appellant's case. The learned Judges in India are far more competent than their Lordships here can be to form an opinion of the credit due to documents of that kind coming from the Collectorate. Their Lordships do not deny that there may be found here and there a name in those documents which raises some doubt whether the julkur of Seetadhar may not have been returned as part of the assets of the zemindary; but, considering what confusion there often is in the nomenclature of villages and other localities in India, their Lordships think that, even if the authority of the documents were upheld, they would not conclusively prove that the plaintiff was entitled to any of the julkurs claimed in this suit. It is quite clear that there is considerable confusion as to the julkurs belonging to the estate, since the plaint originally included julkurs which were afterwards found and admitted to be in the appellant's possession.

On the whole, their Lordships have come to the conclusion that, if they were to reverse the repeated decisions in favor of

the respondents, they would be departing, without any reason, from the rule which they have prescribed to themselves respecting concurrent findings of the Indian Courts upon questions of fact, and that therefore the decree ought to be affirmed. Their Lordships also desire to state, through me, that they come to this conclusion the more readily, because they observe that, when this Board granted special leave to appeal in the year 1866, it did so upon the representation (and without that representation, it seems very doubtful whether it ever would have done so) that this case involved a question of great public importance and of general application,—a representation which, in their Lordships' opinion, the argument at the bar has entirely failed to support.

Their Lordships, therefore, will humbly advise Her Majesty to affirm the decision under appeal, and to dismiss this appeal, with costs.

The 7th May 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Suit against Minor—Declaratory Decree—
Persons not Parties.*

Case No. 1159 of 1872.

*Special Appeal from a decision passed by
the Judge of Midnapore, dated the 1st
May 1872, affirming a decision of the
Officiating Subordinate Judge of that
district, dated the 20th May 1871.*

Mongula Dossee (Defendant) Appellant,
versus

Sharoda Dossee (Plaintiff) Respondent.

Mr. G. Gregory and Baboo Bhowanee
Churn Dutt for Appellant..

Baboo Doorgu Mohun Doss for Respondent.

In all suits in the defence of which a minor is concerned, he ought to be made a defendant and so described; some other person being named as his guardian in the suit.

No suit will lie for the simple purpose of declaring the rights of persons who are not parties thereto.

Markby, J.—In this case the plaintiff brought a suit against "Sreemutty Mongula Dossee, mother of Shushee Bhoosun Kur." Subsequently, but how and when does not appear, the words "a minor" were inserted after the name "Shushee Bhoosun Kur."

The suit was brought to set aside "the allegation of Mongula Dossee that her son Shushee Bhoosun had been adopted by the husband of Mongula Dossee, and had therefore inherited his property."

In settling the issues, the Officiating Subordinate Judge designates Mongula Dossee as the guardian of the minor Shushee Bhoosun, but the designation of the defendant in all the other proceedings including the decree corresponds with that in the plaint.

In the appeal to the district Judge and in the appeal to this Court, the defendant designates herself as "mother and guardian of Shushee Bhoosun her, minor."

It is not very easy to ascertain whether the plaintiff originally intended this as a suit against Mongula Dossee as guardian of the minor, or as a suit against Mongula Dossee herself. It is, however, not contended that the suit was brought against the minor. If that be so, the proceedings in the first Court were informal throughout: and even supposing that there had been no other objection to them, it is extremely doubtful whether they would have been valid as against the minor. In all suits in which the minor is concerned, the minor ought to be himself the defendant and to be so described; some other person being named as his guardian in the suit. That is the form pointed out in an analogous case by Act IV of 1870, B. C., Section 69, and is in accordance with well known practice. But further than this, it no where appears upon the record that Mongula Dossee is the certificated guardian of this minor, or that she has been allowed to defend this suit under the provisions of Section 3 Act XL of 1858. It is impossible, therefore, to treat this as a suit against the minor.

It is contended, however, that it may be treated as a suit against Mongula Dossee herself, and that it is at any rate a declaratory decree against her. It is somewhat strange to argue that a decree is made against a person whom the plaintiff does not intend to sue; but apart from that, I think no suit to make any declaration of this adoption could be brought against any other person than the adopted son himself. If any such declaration ought to be made at all, it ought to be made in a suit in which the minor is defendant. It is something quite novel to attempt to bring a suit for the simple purpose of declaring the rights of persons who are not parties to the suit. Such a proceeding we consider altogether improper, and we think that we ought to

discountenance it by deciding that no such suit will lie, and that the decree of the Moonsiff, as well as the order of the district Judge affirming the same, be set aside. The appeal has been in a manner successful, but as the objection was not taken below there will be no order as to costs.

The 9th May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. B. Kemp, Judge.

Costs—Refund—Interest.

Case No. 12 of 1873.

Miscellaneous Appeal from orders passed by the Subordinate Judge of Rajshahye, dated the 29th February and 20th December 1872.

Kedar Nath Pakrasee and others (Judgment-debtors) *Appellants*,

versus

Doya Moyee Debia and others (Decree-holders) *Respondents*.

Baboo Kashee Kant Sen for Appellants.

Baboos Sreenath Doss, Mohinee Mohun Roy, and Issur Chunder Chuckerbutty for Respondents.

Where a decree under which costs were recovered is reversed, no express order is needed for refund of the costs; the party who recovered having no right to retain the same. Interest is awardable on costs to be so refunded.

Couch, C.J.—THE decree under which the appellants recovered the costs now ordered to be refunded has been reversed. There is no need of any express order to refund the decree of the High Court reversing it. The appellants have no right to retain these costs, and the appeal must be dismissed.

Upon the objection taken by the respondents under Section 348, in support of which are decisions of this Court, one in Volume V, Weekly Reporter, page 74, and the other in Volume IX, page 402, have been quoted, we think the decree of the Lower Court must be amended by allowing interest upon these costs at the rate of six per cent. per annum from the time the appellants received the money until it is refunded by them, that is to say, until the execution of this order. The decree of the Lower Court will be amended accordingly, and the respondents will have their costs in this appeal.

The 9th May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. B. Kemp, Judge.

Contract as to intended Marriage—Hindoo Law.

Case No. 686 of 1872.

Special Appeal from a decision passed by the Assistant Commissioner of Burpettah, dated the 15th January 1872, reversing a decision of the Moonsiff of that district, dated the 9th September 1871.

Seetaram alias Kerra Heerah (Defendant) *Appellant*,

versus

Mussamut Aheeree Heerane (Plaintiff) *Respondent*.

Baboo Obhoy Churn Bose for Appellant.

Baboo Rujonee Nath Bose for Respondent.

An agreement by which persons about to contract a marriage agree that such marriage shall become void on the happening of certain events, *e.g.*, if the husband does not continue to reside within the wife's village, is invalid, as being contrary to the policy of the Hindoo law of marriage.

Couch, C.J.—I TAKE the description of the suit from the judgment of the Assistant Commissioner, which is appealed from. He says, the plaintiff sues to have her marriage with the defendant cancelled on the strength of a bond executed by him before his marriage with her, by which he engaged to consider his marriage void if he ever left the village in which the plaintiff and her friends reside, or in case of cruelty, or in the event of his ever marrying another wife. He founds his decision upon a breach of that agreement, saying "the violation of its conditions" (the conditions of the bond) "are shown to have occurred." I therefore reverse "the order of the Lower Court and decree "the plaintiff's claim by which her marriage "with the defendant is to be deemed void, "with effect from date on which it is shown "he violated the condition of the marriage "agreement." The Assistant Commissioner says that he can take notice of certain decisions of the Courts of Assam which show what he considers to be a usage which would

support this decree; but the usage which he describes is not one of persons making an agreement of this kind that a marriage about to be contracted is to become void on the happening of certain events, but a usage which recognizes that amongst Hindoos in Assam there may be a divorce, and that persons may, by consent, effect one. That is very different from a usage which would sanction a contract of this description. I am supposing that the Assistant-Commissioner had authority to decide this case according to what was the usage in Assam, and that the rules of Hindoo law might be modified by the usage. I am not prepared to say that this is the case, and it is not necessary for us to give an opinion upon that point. In order to support this decision, we must come to the conclusion that an agreement of this kind by which persons, when they are going to contract a marriage, agree that it shall become void on the happening of a certain event,—for instance, as in this case, if the husband does not continue to reside in the wife's village,—is valid and can alter the law of marriage prevailing amongst Hindoos.

We think it is contrary to the policy of the law to allow persons by a contract between themselves to avoid a marriage on the happening of any event they may think fit to fix upon. According to this judgment they might have agreed that the marriage should become void on the happening of any other event, such as if the husband went to any particular place, or did some other act. An agreement of this kind is contrary to the policy of the law, and persons subject to it cannot be allowed to alter the law in that way.

Therefore the decision of the Assistant Commissioner must be reversed. It is immaterial whether the contract was entered into or not, as it would not render the marriage void. A suit cannot be maintained upon such a bond as this.

The appeal must be allowed, and the suit of the plaintiff dismissed with costs.

Kemp, J.—I wish to add that I entirely concur in this judgment. One of the conditions of this bond was that, if the husband who is a Hindoo married again, his first marriage would be considered null and void. Now, supposing this lady who now sues to have her marriage cancelled happened to be barren, the husband, if this contract was one which could be enforced, would not, by reason of that contract, be able to marry again without running the risk of having his marriage with the first wife cancelled. I

think such a contract quite contrary to the policy and spirit of the Hindoo law, and that the suit ought to be dismissed.

The 9th May 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Conjugal Rights—Decree.

Cases Nos. 992 and 993 of 1872.

Special Appeals from a decision passed by the Subordinate Judge of Sylhet, dated the 27th March 1872, affirming a decision of the Moonsiff of Lushkerpore, dated the 1st September 1871.

Kuroona Moyee Debee and another
(Defendants) *Appellants*,

versus

Gunga Dhur Sürmah (Plaintiff) *Respondent*.

Baboos Ashootosh Dhur and Debendro Narain Bose for Appellants.

Baboos Gopal Lall Mitter and Rajendro Nath Bose for Respondent.

A decree requiring a wife to return to her husband is not illegal, and is in conformity with what is asked in a suit for restitution of conjugal rights.

Couch, C.J.—ALL that has been decreed in this case is that the wife shall return to her husband, and there is nothing illegal in such a decree. If there were any reason such as suggested by the pleader for appellant why she should not return, it should have been shown in the defence, not now. We say nothing as to how the decree is to be enforced, but the decree itself appears to be legal and in conformity with what was asked in the suit.

With reference to the case quoted from the Weekly Reporter, we consider that this suit is what the learned Judges say it ought to be, namely, a suit for restitution of conjugal rights.

The appeals in both cases must be dismissed with costs.

The 9th May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Decree—Execution—Transmutation of Names—
Act VIII of 1859 ss. 207 & 208.*

Cases Nos. 2 and 3 of 1873.

*Miscellaneous Appeals from an order
passed by the Judge of Gya, dated the
30th September 1872.*

Kazee Syud Abdoollah and others,
Petitioners;

versus

Syud Reasut Hossein and others, *Opposite
Party.*

Mr. R. F. Twidale and Moonshee
Mahomed Yusoof for Petitioners.

Baboos Mohesh Chunder Chowdhry and
Gopal Lall Mitter for Opposite Party.

Where application is made for execution of a decree standing in the name of a deceased person, the Judge ought, under Section 208 of the Code of Civil Procedure, in exercise of his judicial discretion, to put one of the applicants at least on the record, and to take such steps as to him may seem right and proper for protecting the interests of other claimants. If the deceased died while the suit was pending in appeal, the first amendment in the record must be to put in place of the deceased the names of those persons who were allowed by the Court to carry on the appeal in his name.

Phear, J.—At present we are disposed to think that this is not a case in which an appeal, properly speaking, lies. But at the same time it seems to us very clear that the proceedings of the Judge in the matter of this execution have been so irregular as to be calculated, in all probability, to produce serious embarrassment and prejudice to the interests of the persons who may be eventually entitled to the proceeds realized by the decree.

The decree stands in the name of one Mussamut Bachun; she admittedly is dead. The application for execution of this decree thus standing in the name of the deceased person was made to the Judge by Reasut Hossein. Mr. Twidale's client objected that Reasut Hossein was not alone entitled to the benefits of this decree, and asked to be associated with him in the execution of it.

The Judge says:—"I think it quite clear that the objectors have no ground for the claim which they advance to a share in the decree of which execution is now sought."

And ultimately he rejects the application, and orders the objector to pay to the opposite party the sum of 80 rupees as vakeel's fees.

Now it seems to us that the Judge is wrong in this respect: namely, that he has not taken the preliminary steps which he ought to have taken under Section 208 of the Civil Procedure Code. After hearing the application of the persons claiming to be entitled to the benefit of the decree under the assignment of law, which was effected by the death of Mussamut Bachun, he ought, in exercise of his judicial discretion, to have put one of the parties at least on the record. And further he ought then to have taken such steps as to him might seem right and proper, for protecting the interests of the other parties claiming to be assignees in like manner of Bachun's decree. The record is at present, as we understand, still standing in the name of Bachun, and we think that that must be corrected before any proceedings in execution are allowed to go on.

It seems to us, therefore, that we must quash the order which the Judge has made in execution of the decree, and send back the record to him in order that he may complete the record according to the facts that may be proved before him, and then proceed to execute the decree in due course.

It is manifest that the alterations and additions of names necessary to complete the record may be different according to the stage of the suit at which Bachun's death occurred. If Bachun died, as Mr. Twidale says, at that stage of the case during which the suit was pending in appeal in this Court, and therefore before the final decree which now stands in Bachun's name was passed, the first amendment which must be effected in the record is that in Bachun's place must be put the names of those persons who were in fact allowed by this Court to carry on the appeal in Bachun's name. That amendment having been made, the decree will in fact be a decree in favor of those persons. That is, in order to make the decree correspond with the facts, it must be made to stand as a decree in favor of those persons.

If Bachun's death did take place at that time as alleged, of course there will be materials on the record which will be sufficient to enable the Court to put the real appellants in the deceased's place. That alteration ought to be done, we think, by this Court before the record is sent back to the Judge. When the record is in this way corrected by this Court so as to make it

correspond with the facts of the actual parties as they stood at the time when the final decree was made, it will then be in a state to go back to the Judge under the order which we have just now made. It will then become the duty of the Judge under Section 208 to put in the place of the decree-holders who may then appear to be dead, and who we believe is Noorun alone, those persons who are entitled to represent them. When that is done, and not until then, the record will be in a proper state to be duly executed.

We need hardly add that when the record is thus completed, it will be the duty of the Judge, when he shall be called upon to execute the decree, by any one of the persons among the decree-holders on the record, according to the provisions of Section 207 to take such steps and to pass such orders as it will be deemed necessary for protecting the interests of other decree-holders.

Costs of this hearing and costs incurred in completing the record must be costs in the cause.

Before the record is sent down to the Lower Court, let it be amended by the Registrar of this Court, and in order that it may be done properly let an application be made to us within ten days for the requisite directions.

Therefore this will stand over for ten days.

It is admitted by both parties that this disposes of the two cases, miscellaneous appeals Nos. 2 and 3 of 1873.

The 9th May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Judgment-debtor—Stay of Proceedings—Security.

Case No. 28 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Sarun, dated the 4th February 1873.

Mussamat Bahoooria Doohma Komar
(Judgment-debtor) Appellant,

versus

Lalla Jumahur Lall Paurey (Decree-holder)
Respondent.

Mr. R. T. Allan and Baboo Doorga Doss
Dutt for Appellant.

No one for Respondent.

Where a judgment-debtor asks for stay of execution-proceedings pending appeal, and his request is granted

on condition of his giving security, he is entitled to have a reasonable opportunity for showing that the sum demanded as security is considerably more than the amount awarded by the decree.

Phear, J.—In this case, the plaintiff obtained a decree against the defendant for certain immoveable property, unascertained wassilat, and costs. Against this decree the defendant appealed, and pending the appeal the plaintiff sought execution of his decree to the amount of 3,100 rupees.

Upon this application for execution, the judgment-debtor asked for a stay of proceedings, and a stay of proceedings was granted on condition of his giving security. The amount of security called for by the judgment creditor seems to be 4,000 rupees. At any rate, an order was made upon the judgment-debtor to give security to that extent.

It seems to us that the judgment-debtor has not had such a reasonable opportunity as he is entitled to afforded him for showing that the amount awarded by the decree was in the whole considerably less than 4,000 rupees. The Judge merely referred the matter to the serishtadar to report; and upon receiving the report of the serishtadar he passed this order:—"That the pleader of the judgment-debtor do give security to the extent of Rs. 4,000 in a week as mentioned in the kyfeut," that is, the kyfeut of the serishtadar.

In truth it seems to us that the Subordinate Judge deputed the decision of the question as to the proper amount of security to the serishtadar. And that he determined the matter somewhat in undue haste, we think is apparent from the terms of the order which is, that the pleader of the judgment-debtor do give security. He must be intended to order that the judgment-debtor do give security.

We think that the matter must go to him for redetermination. His order is set aside, and he must give the judgment-debtor an opportunity in the present case of showing due satisfaction of the decree will be required by a security of a less sum than 4,000 rupees.

The respondent must pay the costs of this hearing.

The 9th May 1873.

Present:

Hon'ble J. B. Phear and W. Ainslie,
Judges.

Limitation—Minors—Act XIV of 1859 ss. 11 & 20.

Case No. 319 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Satna, dated the 19th June 1872.

Muthoor Doss (Decree-holder),
Appellant.

versus.

Umbhoo Dutt and others (Judgment-debtors). *Respondents.*

Syud Anter Ali and Baboo Debendro Narain Bose for Appellant.

Boodh Sen Singh for Respondents.

Act XIV of 1859 s. 11 does not save the limitation of a minor, as regards proceedings in execution of a decree.

Phear, J.—We think that this case is decided by authority. It depends mainly on the terms of Section 20, which says that:—"the process of execution shall issue from the Court, &c., to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to set aside such judgment, decree, or order, or to keep the same in force within the time next preceding the application for execution."

There is no saving of the operation of the Act in favor of a minor, unless it is by virtue of Section 11 of the same Act. Limitation. It has, however, now been decided many times in this Court that the power to bring an action which is mentioned in Section 11 is a different thing from the power to take proceedings to execute a decree, and that consequently Section 11 does not save the limitation of time in favor of a minor as regards proceedings in execution of a decree.

There is a decision to this effect reported in the Weekly Reporter, page 10, Miscellaneous Rulings; another in VI Weekly Reporter, page 37, Miscellaneous Rulings; and a third in VIII Weekly Reporter, page 7.

The appeal, therefore, must be dismissed with costs.

The 9th May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Uninstructed Pleader—Ex-parte Decree.

Case No. 7 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Sarun, dated the 6th November 1872.

Dhan Bhagut and another (Defendants)
Appellants,

versus.

Ramessur Dutt Singh (Plaintiff)
Respondent.

Moonshee Mahomed Yusoof for Appellants.

Baboo Mohesh Chunder Chowdhry for
Respondent.

When a duly authorized vakeel of the defendant, under a vakalatnamah filed in Court, appears for his client on the day fixed, and the case comes on for hearing, the decree passed on such hearing is not an *ex parte* decree, even though the pleader be not sufficiently instructed to proceed with the case.

Phear, J.—We think that the decision of the Court below which is appealed against is correct. It appears to us that when a duly authorized vakeel of the defendant, under a vakalatnamah filed in Court, appears for his client on the day fixed for the hearing of the case, and when the case comes on for hearing, the party so represented is not absent, even though the pleader be not sufficiently instructed to proceed with the case. With the greatest deference to the learned Judges of the Bombay High Court, whose decision has been read to us* (if that decision conflicts with ours), we think that a decree passed on such a hearing is not a decree *ex parte*. We may mention there is the additional fact also in this case that the vakeel did on behalf of his client ask for an adjournment of the hearing, and got an adjournment granted.

The appeal must be dismissed with costs.

* 4 Bom. H. C. Rep., 206.

The 9th May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Decree—Mesne Profits—Act VIII of 1859
ss. 196 & 197.

Case No. 33 of 1873.

Miscellaneous Appeal from an order passed
by the Officiating Judge of Patna, dated
the 4th February 1873.

Toondun Singh (Judgment-debtor)
Appellant,

versus

Poklee Narain Singh and others (Decree-
holders) *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Mohesh Chunder Chowdhry for
Respondents.

Where the words of a decree could be completely interpreted under s. 197 Civil Procedure Code, and could only be brought under s. 196 by a reference to certain words in the plaint omitted in the decree, the Court held itself bound to regard the decree as only one for the mesne profits claimed.

Ainslie, J.—It appears to us that on the terms of the decree, this appeal must be allowed. The decree states in terms which are perfectly capable of interpretation, without reference to any other paper except the decree itself, what the order of the Court was. And there is a Section of the Procedure Code, namely 197, under which an order such as that might properly be made. It is true that there is another Section (196) in which a somewhat more extended order, such as the Lower Court believes it was intended to make, might have been passed. But as there is no reference to that Section, and as the words in the decree can be completely interpreted under the other Section, and can only be brought under Section 196 by a reference to certain concluding words of the plaint, omitted in setting out the claim in the decree, I think that we ought to hold that the decree as it stands is only a decree for the mesne profits claimed in the plaint up to the year 1274, to be calculated in execution of the decree.

The Judge's order must be modified in this respect, and mesne profits will be calculated only up to the year 1274.

The respondent must pay the appellant's costs, calculating pleader's fees at Rs. 50.

Phear, J.—I entirely concur.

The 12th May 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Regulation V of 1872 s. 26—Jurisdiction.

In the matter of
Gooroo Doss Roy, *Petitioner,*

versus

Ram Runginee Dossee, *Opposite Party.*

Mr. R. T. Allan for Petitioner.

No one for Opposite Party.

A consideration of the rights of private individuals, and not only the interests of the public with reference to the Government revenue or otherwise, is sufficient to warrant the interference of a District Judge under Regulation V of 1812 s. 26.

Markby, J.—We think we ought not to grant this application. The only question before us is whether or no the District Judge had jurisdiction. Now it was first contended that under Section 26 of Regulation V of 1812, the Court can only interfere for the purpose of protecting the collection of public revenue, and a passage in a decision in the Summary Reports, page 7, was referred to as supporting that contention. But it is quite clear that that was not the intention of the Sudder Court, because at page 145 of the same Volume there is a case in which that Section was considered to apply where public revenue could not have been in any way affected; and in addition to that both the preamble to the Regulation itself and the words of the Section clearly show that only the interests of the public with reference to the Government revenue, and otherwise, but the rights of private persons, are to be considered.

Then the only other ground upon which it has been said that that Regulation does not apply to this case is that the lady in question was not a joint proprietor with Gooroo Doss Roy. The evidence upon that point was taken by the Collector, and the question has been gone into by the District Judge, who for the purposes of this application had full jurisdiction to go into it. Of

he could not decide the ultimate rights of the parties: he has only decided that for the purpose of determining the question which was before him. He has held (and we cannot interfere with his decision) that this lady and Gooroo Doss are joint proprietors within the meaning of that Section.

Upon both these grounds, therefore, the petition must be rejected.

The 12th May, 1873.

Present:

Hon'ble J. B. Phear and W. Ainslie,
Judges.

Lunatico Inquirendo—Act XXXV of 1858
ss. 5 & 22.

Case No. 83 of 1873.

Spontaneous Appeal from an order passed by the Judge of Gya, dated the 1st February 1873.

Mursahoy Lall (Petitioner) *Appellant,*

versus

Mun Singh and others (Objectors)
Respondents.

T. Allan and Baboo Nil Madhub
Sen for Appellant.

Ashootosh Dhur and Luckhee
Churn Bose for Respondents.

A District Judge, in a matter of lunacy, under Act XXV of 1858, stopped the case at a preliminary stage, on a report of the medical officer that the alleged lunatic was laboring under a mental aberration of mind as a consequence of the *gunja*-smoking, which the Judge considered to be of intoxication not amounting to lunacy. That the Judge ought to have gone on to hold that the alleged lunatic was incapable of managing his affairs irrespectively of such incapacity.

J.—THIS is an appeal preferred under Section 22 of Act XXXV of 1858 from the decision of the Zillah Judge in a matter of lunacy.

and ourselves without any evidence on record such as would enable us to

form an opinion as to whether or not the alleged lunatic was at the time when the petition was preferred to the Lower Court of unsound mind and incapable of managing his affairs. We have felt a little difficulty in satisfying ourselves as to the reason of this defect in the evidence. We are inclined to believe that it is this, namely, that the Judge stopped the case, if we may say so, at a preliminary stage of the proceedings. The petition was preferred on the 29th September 1872, and the decision of the Judge was passed on the 1st of February 1873. But it does not appear that in the interval any formal public enquiry was held by the Judge in this matter. As we understand the provisions of Act XXXV of 1858, the regular course appears to us to be somewhat as follows:—The Judge, upon a petition being presented, if it makes out a *prima facie* case, appoints a time and place for a public enquiry, and gives notice to the alleged lunatic of the time and place thereof. In the meanwhile, if it is necessary for the purpose of procuring sufficient and proper scientific evidence bearing upon the question of the alleged lunatic's state of mind, the Court may require the lunatic to attend at any given place in order that he may be examined. Obviously, unless there was some such power as this, inasmuch as the alleged lunatic is a free man, no coercion could be exercised upon him for the purpose of enabling any medical man or others to have access to him, supposing he were averse to it; and the Court may call for a report to be presented to it by the person who has examined the alleged lunatic relative to his state of mind.

It appears to us that the proceedings of this sort under Section 5 Act XXXV of 1858 are of the nature of proceedings preliminary to the formal enquiry; although no doubt there is nothing in the Act to prevent the required attendance of the lunatic and his examination being made coincident with the enquiry itself.

Then when the enquiry is formally held, it is, we think, open to the petitioner to produce all the evidence which he has in his power to produce in support of the allegations in his petition to the effect that the alleged lunatic is incapable of managing his property, by reason of his unsoundness of mind: and the lunatic also should himself be afforded an opportunity, if he desires it, or any one duly appearing in his behalf, of cross-examining the witnesses adduced by the petitioner, and also of adducing evidence

and witnesses in opposition to them. In short, this public enquiry is in substance, as we think, nothing less than a public trial. So far as we can judge from the materials put before us in this case, it appears, as we have already said, that this public enquiry has not been held. The Judge obtained a report from the Civil Surgeon, who had the alleged lunatic under his observation, and from a consideration of that report, he appears to have come to the conclusion that the case was rather a case of prolonged intoxication than a case of lunacy such as was contemplated by the Legislature when it passed this Act XXXV of 1858, and on that ground the Judge was of opinion that the enquiry ought not to be proceeded with.

It thus happens, as we think, that we have no material from which we can judge of the question that would have had to be tried if the enquiry had been held. No doubt the Judge exercises a discretion which is reposed in him when he thus acts upon the report made to him by the medical officer under the provisions of Section 5. And a Division Bench of this Court in a decision which has been read to us has, we believe, approved of the course which was in the case before it similarly taken by a Judge in this manner to stop the proceedings, when it appeared to him that there really was no ground for harassing the alleged lunatic and putting him to the vexation; and even disgrace, which would be the result of the public enquiry.

But in the present case, the report of the medical officer seems to us certainly to lay a ground upon which the Judge ought to have proceeded to a formal enquiry. The Civil Surgeon reports that he has had the alleged lunatic under his observation, and that in his professional judgment the alleged lunatic is laboring under a considerable aberration of mind. He adds, no doubt, that this is a consequence produced by indulgence in the vicious habit of smoking *gunja*. The Judge, upon this, has come to the conclusion that the aberration of the mind of which the Civil Surgeon speaks, is scarcely any other than a form of intoxication which in his opinion the law does not consider to amount to a lunacy, and from the evil consequences of which the law will not step forward to protect the *gunja*-smoker.

It appears to us, however, that in this conclusion the Judge was hardly justified. We think the only material before him at that stage of the case was a formal report of the Civil Surgeon to the effect that the man

was in fact laboring under a considerable aberration of mind. The Judge ought, therefore, to have gone on to hold the public enquiry as to the state of mind of the alleged lunatic, and to have satisfied himself upon all the evidence which the petitioner and others had to give before him, whether or not the alleged lunatic was incapable of managing his affairs by reason of the unsoundness of mind, irrespective of the question whether that unsoundness was produced by the vice of smoking *gunja*, or by any other cause.

The case is entirely different from that in which the Judge stopped the proceedings out of consideration for the alleged lunatic himself.

With these views, we think that these papers must be sent back to the Judge with the direction that he must proceed with the enquiry as to the state of the mind of the alleged lunatic, namely, the enquiry whether or not he is incapable of managing his affairs by reason of unsoundness of mind.

We make no order for costs.

The 12th May 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Act VIII of 1859 s. 7—Arbitration Award.

In the matter of

Grish Chunder Chooramonee, *Petitioner,*

versus

Brojonath Bhattacharjee, *Opposite Part.*

Baboo Mohesh Chunder Chowdhry for
Petitioner.

Baboo Sreenath Doss, Kalee Prosunn
Dutt, and Tarack Nath Sen for Opposit
Party.

The privilege given in Act VIII of 1859 s. 7 to a plaintiff in a suit to abandon the excess of a claim applies also to a case where the party comes in with an application to cause an arbitration award to be filed.

Markby, J.—As regards all the matters which have been mentioned in this application

having reference to the alleged irregularities in the arbitration proceedings prior to the order of the Moonsiff, we think that there is no sufficient information before us to enable us to say that, by reason of those irregularities, the Moonsiff had no jurisdiction, if his jurisdiction is otherwise unimpeached.

The question to be determined is whether we must say that the Moonsiff had not jurisdiction, because the award which he was asked to file awarded to the party who made the application, the sum of Rs. 1,050. The applicant was aware that *prima facie* that would be beyond the jurisdiction of the Moonsiff, and in his application he expressed his willingness to abandon Rs. 50 in order to bring the sum to Rs. 1,000, the usual limit of the Moonsiff's jurisdiction. And the question which we have to determine is whether the provisions of Section 7 of the Civil Procedure Code are applicable to this case. Now, no doubt it may be said that in very strict language this was not a suit; but still it seems to us that it would not be stretching the words of that Section beyond their reasonable construction to hold that they apply to such a case as this. It is not like the case which was put in the course of the argument of an application to execute the decree; there the jurisdiction has already been determined. This was the first occasion upon which the parties came into the Civil Court at all, and although the application to file an award is not strictly speaking a plaint, it is an initiation of a proceeding in the Civil Court which terminates in an order which, whether it be called a decree, can be enforced by execution in the same way as a decree, therefore it is in many respects analogous to a suit. Under this Section also the application to file an award is to be registered and numbered as a suit between the applicant as plaintiff, and the other party as defendant. We think, therefore, that it would not be going beyond the reasonable construction of the words of Section 7 to hold that the privilege there given to a plaintiff in a suit to abandon the excess applies also to a case where the party comes in with an application to cause an arbitration award to be filed. Upon these grounds, therefore, we are not prepared to say that the Moonsiff had no jurisdiction.

The application must be dismissed with costs.

The 22nd April 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, Judges.

Act VIII of 1859 s. 229—Possession.

Case No. 680 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 27th January 1872, reversing a decision of the Moonsiff of Hurhurparah, dated the 30th May 1871.

Taleb Hossein Khan and another (Plaintiffs)
Appellants,

versus

Gooroo Pershad Roy and others (Defendants)
Respondents.

Baboo Umbika Churn Banerjee for
Appellants.

Baboo Taracknath Dutt for Respondents.

L purchased certain land described as lakheraj from F, on whose refusal to register the kobalah or to give possession he brought a suit which was decreed. The right, title, and interest in that decree were purchased by T. Intermediately, the land was relinquished by F, as if it were māl land, to the zemindar under an istifa, and on T's going to execute the decree he was obstructed by the zemindar, and thereupon the claim was investigated under Act VIII of 1859 s. 229:

Held that the plaintiff was entitled to possession, but as regards the question whether the land was lakheraj or māl that would be for decision if the

zemindar should bring a suit to assess or resume the land.

Jackson, J.—THIS special appeal arises out of an enquiry which took place under Section 229 of the Civil Procedure Code. One Luchmun Pal purchased certain land from Fukeerooddeen Hossein, but the vendor refused to register the kobalah or to give up possession of the land. Thereupon Luchmun Pal brought a suit, and, he dying while the suit was pending, a decree was obtained by his son. The right, title, and interest in that decree has been purchased by the special appellant before us. We should mention that the land sold to Luchmun Pal was described as lakheraj. Intermediately, the mother of Fukeerooddeen relinquished the land in question as if it were māl land to the zemindar, Gooroo Pershad Roy, and made over the land with all standing crops, trees, &c., to him or to his agent; and the purchaser of Luchmun Pal's rights going to execute his decree was obstructed by the zemindar who alleged he was *bonâ fide* in possession of the property under the istifa of Fukeerooddeen's mother, and thereupon his claim was submitted to investigation under the Section we have quoted. The matter was first tried by the Moonsiff of Hurhurparah, Baboo Kisto Chunder Chatterjee, who, in a careful and, as far as we can judge, reasonable judgment, decided in favor of the plaintiff. Before him issues were raised whether the plaintiff's vendor had a permanent transferable interest in the jote, and, at the instance of the defendant, whether the land was māl or lakheraj, and also whether Fukeerooddeen's mother had relinquished the land. Fukeerooddeen himself was called to give evidence, and he shamelessly declared that the land which he himself sold to Luchmun Pershad as lakheraj was really māl land which he held under the zemindar. The Moonsiff, however, determined that the land was lakheraj and not māl, and was consequently transferable. He therefore gave judgment in favor of the plaintiff. On appeal, the District Judge, Mr. Grey, observing that the plaintiff admittedly had never been in possession of the land felt himself bound to say that the burden of proof lay upon him, and finding that the plaintiff had failed to prove that the land was lakheraj, he considered that plaintiff was not entitled to the judgment of the Court, and reversed the decision of the Moonsiff.

It is quite clear, from the decision that, as between the Fukeerooddeen, the plaintiff was in possession of this land. It is between the zemindar and Fukeerooddeen that the zemindar only became entitled, never was, to re-enter on this land. The istifa made by Fukeerooddeen's mother, which, for the purpose of the present decision, we may deal with as an istifa by Fukeerooddeen himself. Now the istifa was made after a decision adverse to Fukeerooddeen had been come to in Luchmun Pal's suit. It is idle to say that the zemindar was not aware of that suit. The whole circumstances—the abrupt surrender of the land with everything that stood upon it, and the perjury committed by Fukeerooddeen and the present investigation make it beyond doubt that this man, finding himself unable to resist the plaintiff's righteous claim, spitefully endeavoured to deprive him of the fruits of his decree by putting the zemindar in his place. It appears to us that the Court ought not to have permitted the zemindar to take that place. As far as the investigation has gone, it seems there were excellent grounds for believing that the land was really lakheraj, but it is not necessary that we should decide, and we do not decide, this question. That will be a point for decision if the zemindar thinks fit to bring a suit for the purpose of assessing or resuming the land. It is contended that as the case stands a remand ought to be made to the Lower Appellate Court in order that evidence may be gone into as to the nature of the plaintiff's holding, but we do not think it necessary to do so. The nature of the holding is fully exposed in the judgment of the Moonsiff who heard the witnesses and tried the case. We do not think that the interests of justice require that we should remand the case in order that the Lower Appellate Court may give its opinion on the evidence. As far as the present proceeding goes, it seems to us that the plaintiff is entitled to be put in possession of the land; and any question as to the nature of the tenure, or as to the terms on which he should hold it, or as to whether the land is māl or lakheraj, and whether the tenant has any permanent transferable interest therein, must be decided in a suit brought by the zemindar.

The decision of the Lower Appellate Court will be reversed with costs.

The 13th May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Transfer of Under-tenures—Registration—Sale under Act VIII (B.C.) of 1865—Act X of 1859 ss. 105 & 106.

Case No. 911 of 1872.

Special Appeal from a decision passed by the Judge of Jessore, dated the 27th March 1872, modifying a decision of the Subordinate Judge of that district, dated the 13th December 1870.

Anund Lal Mookerjee (Defendant)
Appellant,

versus

Kalika Pershad Misser and others (Plaintiffs)
Respondents.

Baboos Ashootosh Dhur and Romesh Chunder Mitter for Appellant.

Baboo Kalee Mohun Doss for Respondents.

Where an under-tenure has been transferred, but the transfer is not registered in the serishtah of the zemindar or superior tenant, the transferee is nevertheless entitled as a person interested in the protection of the tenure to stop its sale in execution of a decree under Act VIII (B.C.) of 1865, by paying into Court the amount of the decree, though he is not entitled, unless the transfer is registered, to come in and allege that the person against whom the decree has been obtained was not the proprietor of the under-tenure, and was not in legal possession.

Couch, C.J.—THE Judge has found that the sale was not a fraudulent one. Therefore we are not to consider the case as a suit brought by a third person, or a person not a party to the suit in which the sale was made, for setting it aside on the ground of fraud. We shall have to see whether it can be entertained as a suit to set aside the sale on account of irregularity in it.

A decree had been obtained for an arrear of rent due in respect of the under-tenure. The defendant in that suit was the person whom the zemindar had a right to suppose was the tenant. Act VIII of 1865 (B.C.)

provides for the manner in which a sale shall be made under a decree of that kind, and Section 6 says that if the sum due under the decree is paid into Court at any time before the sale commences, either by the defaulting holder of the under-tenure or any one on his behalf, or any one interested in the protection of the under-tenure, the sale shall not take place. The present plaintiff might have stopped the sale by paying the sum due under the decree into Court. Although his transfer was not registered, he was a person interested in the protection of the under-tenure and entitled to do that. The money was not paid into Court, and therefore there is no ground in law for saying that the sale was improper or irregular on account of the payment of the money to the naib of the zemindar. The person who wished to stop the sale ought to have taken the proceedings directed by the law. The only irregularity which the law could take notice of in these proceedings was that the sale was not held at the place named in the notification. That, no doubt, was an irregularity; but the Judge finds, and he is the proper authority to come to a finding upon that matter, that the changing of the place of sale did not cause any deficiency of bidders, and in that way injuriously affect the owners of the property that was sold. He considered that it did operate injuriously, because, as he says, if the place had not been changed, the money would have been received in time to stop the sale, and so the sale would have been stopped. But that is not a ground of injury that can be taken notice of; for the money was not paid in the only way which would authorize the stopping of the sale, and until the money was paid into Court the authorities ought not to have taken notice of it. The law has provided, and we think wisely, that in order to stop the sale, the sum due under the decree shall be paid into Court. This provision seems to have been made to prevent any question being raised upon the doubtful and untrustworthy testimony of witnesses, whether the money had been paid to a naib or mookhtar of the zemindar, or any other person. In fact, according to the finding of the Judge, there was not an irregularity which injuriously affected the parties so as to be a ground for setting aside the sale.

The law has said what shall be done in the case of an irregularity of this description in sales. Section 13 of Act VIII of 1865 (B.C.) says that an appeal is to lie to the Collector from any proceedings of a Deputy Collector,

if made within fifteen days, and then it says that no proceedings under this Act shall be reversed or modified in appeal, except upon the ground of irrelevancy of the law, or of such an irregularity in procedure as, in the opinion of the appellate authority, has caused injury to the interests of one of the parties to the suit in which the decree was passed. Here no ground is shown upon which this sale could have been set aside, if this course had been taken.

Then, should the present plaintiff be in a better position for setting aside this sale for irregularity than the person against whom the decree was made would have been? There is no ground upon which he can be in a better position and be entitled to complain of anything as an irregularity which the other would not have been entitled to complain of. Section 106 of Act X of 1859 expressly says that no transfer of an under-tenure which, by the provisions of this Act or any other law for the time being in force is required to be registered in the serishtah of the zemindar or superior tenant, shall be recognized unless it shall have been so registered. That proviso applies to Section 105. These two Sections are to be taken together. Section 105 provides for the sale of transferable tenures; and Section 106 for a person to whom a tenure has been transferred putting in a claim that it may not be sold in execution of a decree against another person. Where a decree has been obtained against the tenant who was known to the zemindar, it enables the transferee to come in and allege that the person against whom the decree has been obtained was not the proprietor of the under-tenure, and was not in lawful possession. But then it provides that no transfer shall be recognized for any such purpose unless it has been registered. It may be that for other purposes the transfer would operate; it would operate between the person making it and the person to whom it is made; but until it has been registered, the zemindar is entitled to treat the transferor as his tenant, as the person liable to be sued for the rent and against whom the decree is properly obtained. Where the transfer has not been registered, all that the transferee can do is to stop the sale under Section 6 of Act VIII of 1865 (B.C.), by paying the money into Court, or if there has been an irregularity of which the defendant in the rent-suit could complain, and by appealing have the sale set aside on account of it, the transferee may be able to do the same. He is in the same position as the transferor, and is not entitled

to go beyond that, where there has been no fraud.

We think this suit to set aside the sale cannot be maintained, because no irregularity has been shown which caused injury to the interests of one of the parties to the suit in which the decree was passed.

The decree which has been appealed from must be reversed, and the decree of the first Court in which a proper view of the case seems to have been taken will stand. The appellant will have the costs of this appeal and of the appeal to the Lower Court.

The 13th May 1873.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Defamation of Character—Damages.

Case No. 185 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 26th May 1871.

Shaik Ameenooddeen Ahmed (Plaintiff)
Appellant,

versus

Bibee Khyroonnissa (Defendant)
Respondent.

Mr. C. Gregory and Moonshee Mahomed Yusoof for Appellant.

Mr. R. E. Twidale and Baboo Kale Kishen Sen for Respondent.

An action to recover damages for defamation character brought by the late mookhtear and may of a purdanasheen Mahomedan lady who had petition to the Moonsiff represented that she discharged the plaintiff from her service, because not managed her properties truthfully and correctly had acted corruptly and in fraud, was dismissed Subordinate Judge:

Looking to the conduct of the plaintiff who rendered no accounts and had allowed a year to before resenting the libel, HELD by Kemp, J. (Glover

dissenting) that defendant had reasonable grounds for making the statement, and that in the absence of evidence of malice the suit was rightly dismissed.

Glover, J.—THIS was a suit to recover damages for defamation of the plaintiff's character, the amount claimed being Rs. 11,000.

The defamation complained of was contained in a petition filed in the Civil Court by the defendant, in which she stated that the plaintiff who had been her mookhtear, "instead of acting with honesty, uprightness, and propriety, had effected embezzlement and misappropriation in various ways, and that there was every probability for the by which that he would commit further and elements; and adding, that for these to she had dismissed the plaintiff his mookhtearship, and intended to bring charges against him in the Criminal Court."

The plaintiff is the brother-in-law of the defendant, and the person who has succeeded him as mookhtear is the defendant's son-in-law.

There is no contest as to the employment of the words complained of. The defendant pleads that she was justified in using them and in believing that plaintiff had acted dishonestly and improperly, inasmuch as he had rendered her no accounts of his stewardship for three years, and that that fact alone would afford a sufficient ground for imputing dishonesty.

The Subordinate Judge took this view of the case, and thought that the defendant had reasonable grounds for using the expressions objected to by the plaintiff. He dismissed the suit with costs.

I cannot agree in this view of the case. That the words used were defamatory there can be no doubt, and the onus is on the defendant to show that she was justified in using them. Now the only ground of this justification was the fact—if it be admitted to be a fact—that the plaintiff had not given in his accounts for the three years he had been manager. I do not think that this was enough to justify the defamation. There is no evidence whatever to show that the defendant ever called on the plaintiff to give in his accounts, or that she wished him to do so. Considering the connection between the parties, it was not very wonderful if accounts had not been rendered, and it never seems to have struck the defendant that accounts were necessary until she wanted to appoint her son-in-law mookhtear in the place of her

brother-in-law, and then she made the plaintiff's laches in this respect the ground of distinct charges of fraud and embezzlement.

That notwithstanding the non-production of the account, the defendant had not been in any way wronged by the plaintiff is proved most conclusively by the safeenamah given by her to him three months after his dismissal. In this document, which is admitted to have been given, and which the witnesses prove to have been given intelligently and freely, it is distinctly asserted that all the accounts had been settled and found correct, and that nothing was owing by the plaintiff to the defendant.

The defendant is bound by her own deliberate act. There is not a tittle of evidence to show that she was either forced or cajoled into filing this safeenamah, and the result is that three months after she had been making wholesale charges of fraud and corruption against her brother-in-law mookhtear, she is found wholly retracting those statements and giving him a full and complete acquittance of all demands.

To my mind she had no just ground for making her former reckless charges—charges which the least care or enquiry would have shown her to be false. Had she called upon the plaintiff to give in his accounts, or had he neglected to comply, that would have been a different thing. I think that the plaintiff was entitled to judgment.

As to the amount of damages, it is proved that the plaintiff is a man of respectable family and means, but it is not shown that he has suffered in any way from the petition presented to the Moonsiff. The evidence on this point is altogether too vague and general. Still he is in my opinion entitled to some damages, and the fact that he has ludicrously over-estimated them is no reason why the Court should not award what seems to be a fair equivalent for the injury done.

Taking all the circumstances into consideration, the relationship between the parties, the fact of the defendant being a purdanasheen lady and a good deal under the influence of others, and that the plaintiff made a considerable delay in bringing his suit, I think that an award of Rs. 250 with costs in proportion will sufficiently meet the ends of justice. If the effect of this order be to make the plaintiff pay more as costs than he recovers as damages, it is his own fault for assessing his claim at an absurdly high figure.

Kemp, J.—I regret that I am unable to concur with Mr. Justice Glover.

The plaintiff sues to recover damages for defamation of character, assessing those damages at Rs. 11,000.

It appears that the plaintiff, who is the brother-in-law of the defendant, a purdahnusheen Mahomedan lady, was appointed by her to be her am-mookhtear and general manager of her estates. He held that appointment from September 1866 to November 1869.

He rendered no accounts whatever at the close of each year; indeed his own witness Mohsen Ali states that the accounts covering the whole period of his employment were made over to the defendant by the plaintiff in March 1870 when a safeenamah or deed of acquittance was executed by the defendant.

The plaintiff would have us put a very high estimate upon his character, but we find that he was anything but prompt in vindicating his character, for the petition which contains the alleged libellous passage is dated the 29th November 1869, and this suit is not brought until the 22nd November 1870; another eight days and it would have been barred under the statute of limitations.

Again, we find, that although the libellous passage was published in November 1869, it was not until March 1870 that the plaintiff took any steps to vindicate his character by filing his accounts.

The passage complained of is contained in a petition to the Moonsiff informing that officer that the defendant had discharged the plaintiff from her service, and appointed her son-in-law in his stead. It was necessary to give some reason for this step, and it was stated in a somewhat general

* I would refer to a decision of this Court printed in Volume II, Weekly Reporter, page 164, *Mirza Ekbal Bahadoor and others, defendants, appellants, v. Mr. R. Solano, plaintiff, respondent.*

way that the plaintiff had not managed the properties truthfully and correctly; "*ras-teeodooroostee*," and that he had acted in several ways corruptly and in fraud of the defendant, "*chund ture he keyanut oo tusuroof amul men luya*."

I am of opinion, looking to the conduct of the plaintiff, that the defendant had reasonable grounds for making this statement, and in the absence of any evidence of malice I would confirm the judgment of the Subordinate Judge and dismiss the appeal with costs.

The 13th May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, Judges.

Summons—Appeal—Notice.

Case No. 174 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 22nd February 1872.

Doolee Chund and others (Plaintiffs)
Appellants,

versus

Nirban Singh (Defendant) *Respondent.*

Baboo Nil Madhub Sen for Appellants.

No one for Respondent.

Where an appellant failed for twelve months to serve notice of appeal upon his respondent, the Court refused to allow him the opportunity to have a fresh summons issued and served.

Where the party serving a notice of appeal finds the respondent absent from home and is told where he is, and yet affixes the notice to the door of his house, such service is void and of no effect.

Phear, J.—On this case being called on for hearing, no one appears for the respondent; and upon a reference to the record it is perfectly clear from the depositions of the serving peon and the person who accompanied him to serve the notice on behalf of the appellant, that no notice of appeal has been served upon the respondent. The service, if effected at all, ought to have been effected upwards of twelve months ago, the case having been on the files of the Court ever since May 1872. It is certain that we cannot go on with the hearing. The only question whether we ought to give the appellant opportunity of having fresh summons issued and served upon the respondent. We have given some consideration to the matter, and we think that we ought not to give the appellant any indulgence of this sort. It was his duty to see that service was properly effected. There was nothing whatever to mislead him in the case. His own agent was present at the time when the service was supposed to have been effected: he must have known that the so-called service was absolutely void and of no effect at all. These very persons state that they were told that the respondent was not in his house at the time, that he was elsewhere; and were told where he was; yet

they chose, to affix the notice on the door of the house, and call that a good service for the purposes of this appeal. The appellant and his advisers have had twelve months to find out how this matter really stood, even if they were ignorant of it at the first. They needed only to have glanced at the depositions which were on the record to perceive that no service had been effected. We decline, therefore, to order a fresh summons to issue. The consequence is that this appeal must be taken off the file.

The 14th May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

*Unstamped Deeds—Secondary Evidence—
Procedure—Special Appeal.*

Case No. 943 of 1872.

Special Appeal from a decision passed by the Second Subordinate Judge of 24-Pergunnahs, dated the 14th March 1872, reversing a decision of the Additional Moonsiff of Alipore, dated the 31st December 1870.

Haran Chunder Bhoojee (one of the Defendants) Appellant,

versus

Russick Chunder Neogy (Plaintiff)
Respondent.

Baboo Rash Beharee Ghose for Appellant.

Baboo Sham Lall Mitter for Respondent.

All that it would be right for the Court to require for protection of the revenue, in cases where a lost deed is shown not to have had a stamp, would be that the money should be paid, before admitting secondary evidence, as would have to be paid if the deed itself were produced. If the Court does not do that, but allows secondary evidence to be given of the contents of the deed, it is not an error which affects the merits of the decision, or a ground for a special appeal.

Couch, C.J.—THE plaintiff's case was that he had purchased from Dino Moyee, the daughter of a former owner of the property, and that she had obtained it by a gift from her father. The deed of gift was not produced. The Lower Courts appear to have been satisfied that it could not be produced, that it was, as admitted by the plaintiff, unstamped, and that it had not been registered.

On appeal, the Subordinate Judge allowed secondary evidence to be given of the deed of gift, and it is now objected that he was wrong in this; that the deed being unstamped and unregistered, and therefore not admissible in evidence, if it had been produced, secondary evidence could not be received of its contents.

As to the objection of want of registration, it does not appear that it was executed when the Registration Act of 1864 was in force; so that objection cannot be taken. But the deed does appear to have been executed when the Stamp Act of 1862 was in force, and it required a stamp. If the contention on the part of appellant is right, the plaintiff would be in a much worse position, the deed having been lost, than if he had an unstamped deed and produced it in Court; because, according to the law, the unstamped deed, when produced in Court, might be received in evidence upon paying the penalty, if the Court thought fit to allow it. If, when a deed is lost, being unstamped, no secondary evidence of its contents can be given, the law would press much more hardly than when it is not lost. At the utmost, all that it would be right for the Court to require for the protection of the revenue, in cases where a lost deed was shown not to have had a stamp, would be that the same money should be paid, before admitting secondary evidence, as would have to be paid if the deed itself were produced. But that is a question for the Court to deal with for the protection of the revenue. We think if the Court does not do that, but allows secondary evidence to be given of the contents of the deed, it is not an error which affects the merits of its decision, and which a person can take advantage of in a special appeal. This ground of appeal cannot be allowed.

The other grounds, we have already intimated, have no foundation. The second is:—"There is no evidence, that is legal evidence, to prove such a diligent search as would be sufficient for the foundation of a case for the reception of secondary evidence." That is a matter for the Judge to consider, and putting in the words "legal evidence" does not make it a ground of special appeal.

The third ground is that the Subordinate Judge is in error in holding that the Court ought not to put him (the plaintiff) to a strict proof of his title. It is no ground of appeal that the Court did not do that. The plaintiff has been put to such proof of his title as it was necessary he should give.

And the fourth and last ground is that the Court ought not to have entered into the question of title before discussing the evidence adduced by the plaintiff, and that this error has affected the decision on the merits. To suppose that, because the Court has adopted this order of discussing the evidence, the decision on the merits has been affected, is to impute to the Judge great want of sense and inability to perform his duty. The case has been carefully considered by him, and there is no ground for the special appeal. It must be dismissed with costs.

The 14th May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Rent Suit—Kubooleut—Admissions.

Case No. 945 of 1872.

Special Appeal from a decision passed by the First Subordinate Judge of Bacher-gunge, dated the 12th February 1872, modifying a decision of the Moonsiff of Burrisal on the 31st July 1871.

Rooknee Kant Roy and another (Plaintiffs),
Appellants,

versus

Shurikutoonnissa Bibee and another
(Defendants) *Respondents.*

Baboo Kashee Kant Sen for Appellants.

Baboo Rash Beharee Ghose for Respondents.

In a suit for arrears of rent where plaintiff failed to prove the kubooleut which fixed the amount of rent, and there was no evidence to show that he was entitled to the rate at which he had estimated it, the Judge was held to have done right in taking the amount which was admitted by the defendant to be due as rent.

Ob. dic.—It is unreasonable to hold that, because a plaintiff in such a case has been guilty of setting up a forged kubooleut, he should be obliged to bring a fresh suit to recover an admitted balance of rent.

Couch, C.J.—THE suit was brought to recover arrears of rent from 1274 to 1276, the plaintiff claiming a balance of Rs. 222-7 for principal, and Rs. 70-9 for interest, making a total of Rs. 293.

The judgment of the Subordinate Judge which is appealed from is not altogether clear, and it might at first sight appear that he had held that, because a part of the land had been washed away and it could not be shown what the quantity was, the plaintiff was entitled to receive the rent which was admitted by the defendant; but his decision was really founded upon the plaintiff having failed to prove the kubooleut which fixed the amount of rent; and he has stated that there was no evidence on the part of the plaintiff which would show that he was entitled to the amount at the rate he had estimated it at. Under those circumstances the Judge was right in taking the amount which was admitted by the defendant to be due as rent.

We must say we do not concur in those cases, if, as is said, there are any such, which have decided that where a man sues for arrears of rent as due under a kubooleut, and the defendant denies the kubooleut, but admits that a certain amount of rent is due to the plaintiff, if the plaintiff fails to satisfy the Court that the kubooleut is a genuine one, the suit is to be dismissed altogether, and that the plaintiff is to be obliged to bring a fresh suit to recover the balance of the rent admitted to be due. We think it would be unreasonable to hold that, because he has been guilty of setting up a forged kubooleut, he should be obliged to bring a fresh suit to recover an admitted balance of rent. We think, in this case, the plaintiff is entitled to recover the balance which was admitted.

Then what sum was admitted to be due. The defendant's admission was that Rs. 123 remained due from him to the plaintiff, but in making that the balance he took credit for Rs. 100 which he said he had paid. It is found that he had not paid the Rs. 100, and therefore if his admission be taken with this, he is really shown to be indebted to the plaintiff for rent in the sum of Rs. 223-8. That is the sum for which a decree ought to have been given by the Lower Appellate Court. The decree must be altered accordingly. Each party must pay his own costs of this appeal.

The 14th May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Joint Property—Presumption of Hindoo Law—
Onus Probandi—How to rebut the Presumption.*

Case No. 191 of 1872.

*Regular Appeal from a decision passed by
the Additional Judge of Tirhoot, dated
the 15th March 1872.*

Bholanath Mahta and another (Plaintiffs)
Appellants,

versus

Ajoodhya Pershad Sookool and others
(Defendants) *Respondents.*

Baboo Hem Chunder Banerjee for
Appellants.

Baboos Doorga Doss Dutt and Boodh Sen
Singh for *Respondents.*

The presumption of Hindoo law that all property held by any member of a joint family during the time the family is joint is a disputable presumption and must have foundation of fact to rest upon. It cannot alter the *onus* which lies on a plaintiff to make out his case; but only him in proving it. An enquiry into the source of purchase-money with which the property in dispute obtained, though the best possible, and probably a conclusive means, of rebutting the presumption, is not only means allowed by law for doing so.

hear, J.—In this suit the plaintiffs seek to recover possession of two-thirds of 8 annas of the entire 16 annas of a certain saltpetre town with lands and appliances belonging to. They state their claim as follows:—“That Sheeb Newaz Mahta, father of defendant second party, and Birj Lall Mahta, father of your petitioners and defendant third party, were two uterine brothers, living in commensality. That after the death of your petitioner's father and father of defendant second party, your

petitioners and defendants second and third parties all along lived in commensality and in one and the same house as before. That the disputed property, as also other properties, moveable and immoveable, continued to be acquired while their families remained joint; that accordingly each of them held the saltpetre godown and houses situated in Kusba Mozufferpore and Mahadeo Dutt, and mouzabs, villages, gardens, &c., and appropriated the proceeds thereof jointly; and therefore out of the joint property acquired in a coparcenary state, 8 annas are the share of the heirs of Sheeb Newaz Mahta, and the other 8 annas are the share of the heirs of Birj Lall Mahta; that each of them all along continued in possession of his respective shares.”

The plaintiff then goes on to state that notwithstanding this, the property which is the subject of claim “was sold by auction, on account of a personal debt of Shumrun Lall Mahta, debtor, in execution of a decree of Mr. Lingham, on the ground of auction-purchase of the exclusive right of the said Shumrun Lall Mahta, one of the sons of Sheeb Newaz Mahta;” and in this way the plaintiffs have been deprived of their share in the property.

The essence of this claim obviously lies in the allegation that the property which is the subject of suit, was joint family property belonging to the plaintiffs and to the execution-debtor of Mr. Lingham together with others, and that so far at any rate as regards the share of the plaintiffs in it, it has been alienated without authority.

In the argument of this case, very great stress indeed has been laid upon the doctrine of presumption in favor of the plaintiff's claim: the argument was even stretched so far as this assertion, namely, that it was not necessary for the plaintiffs to prove any facts in order to launch their case. They had alleged that the property was the joint property of themselves and other person living together as a joint Hindoo family, and it consequently lay upon the defendant to show that the property was not in this predicament.

I shall come presently to the evidence which is on the record, adduced both on the part of the plaintiff and of the defendant. For a moment I will direct my attention to some of the authorities which have been quoted in support of the position which the plaintiff's pleader thus took up. There has been, no doubt, some conflict of opinion in this Court as to the mode in which, or the

extent to which, the doctrine of Hindoo law relative to the presumption to be made in regard to Hindoo property is to be applied. One of the cases in which the doctrine in question was applied is reported in the X Weekly Reporter, page 198: and some importance was yesterday in course of the argument before us, attached to the fact that a Division Bench of this Court has lately pronounced the decision which was passed by the earlier Division Bench in that case to be erroneous in law. A report of the later case, which is printed in the XIX Weekly Reporter, page 178, was referred to in order to show this. In the report there given the passage occurs:—
 “There is one more case which I must notice that is directly opposed to the decision of the Privy Council. It is reported in I Bengal Law Reports, page 164, Appellate cases, and also in X Weekly Reporter, page 198. With every respect for the learned Judges who pronounced that decision, I feel obliged by the superior authority of the Privy Council to differ from it. The law laid down by the Judicial Committee in the case in XII Moore’s Indian Appeals* does not appear to have been presented to the learned Judges. Probably if it had been, they would, whatever their own opinion might be on the subject, have considered that they were bound to follow it.”

It is I think for many reasons somewhat unfortunate that one Division Bench of this Court should have found itself obliged to express its opinion with regard to the decision of another Division Bench so strongly as to amount to saying that that decision was wrong in law. One reason is that no doubt such a statement must necessarily have the effect of making the parties who were affected by the former decision dissatisfied with the determination of the matter which then fell to be determined; and at the same time the second Division Bench has no authority to disturb the decision of the first, neither is its opinion as to the propriety of that decision necessarily better than that of the Bench which passed it. And as it is not generally expedient, so also it is not usual, and I must say also with the greatest deference for the learned Judges who delivered the later judgment that I cannot see that it was necessary in this particular instance for a Division Bench to make a statement going quite so

far as that of which I am speaking. I feel myself bound very reluctantly to comment, to the small extent which I propose to comment, upon this passage, because it fell to me to express the opinion of the Division Bench which was passed in the earlier of the two cases. It may be that in the words which I then used, there is an unnecessarily broad statement of that which the law required the plaintiff under the circumstances of that particular case to establish before he could succeed in his suit, a statement which may possibly be in some of its particulars erroneous, though I do not feel myself called upon at present even to consider whether it was so or not; but however this may be, it is now I think incumbent on me as a duty to the parties concerned in that case to say that, having carefully reconsidered that decision with the light which the judgment reported in Volume XIX, Weekly Reporter, page 178, may have thrown upon the matter, I am still of opinion that the original decision was a perfectly correct decision in law. I think that on the solitary fact which was before the Court in that case, resting solely on an admission made in the defendant’s written statement, it was impossible for this Court on special appeal to do otherwise than declare that the decision which the Subordinate Judge had come to was a perfectly good decision in that case. And it is not an immaterial error (an error apparent in the copy of the judgment which is given in the 19th Volume of the Weekly Reporter) to suppose that the Division Bench in the first case had not before it all the other existing authorities. It was not possible that the judgment of the Privy Council which is reported in 12 Moore’s Indian Appeals* and to which so much weight has been attributed by the second Division Bench, or that the law which is supposed to have been laid down thereby, could have been presented to the former Division Bench for the simple reason that the judgment of the Privy Council was not delivered until 1869, whereas the decision of the Division Bench which is in question was passed in 1868. And further it did certainly happen to be the fact that the view of the law which is expressed in the 12 Moore’s Indian Appeals, page 540,* was precisely the view which the Judges of the Division Bench took and by which they intended to be guided. This I think is quite manifest on the face

* 12 W. R., P. C., 21.

* 12 W. R., P. C., 21.

of the judgment itself. It is perhaps superfluous to add that the enunciation of the law in the 12 Moore's Indian Appeals, page 540, which has been made so much of, is not in any degree a new statement of the law. Indeed it can hardly be said with correctness that any law was there laid down. The words of the Privy Council, as reported, are:—"The normal estate of every Hindoo family is joint. Presumably, every such family is joint in food, worship, and estate."

"In the absence of proof of division such is the legal presumption; but the members of the family may sever in all or any of these three things."

In these words, obviously, a simple reference was made to that which was generally acknowledged to be the state of the law, merely for the purpose of going on, as the Privy Council presently does go on, to show that in that particular instance the rule of presumption did not apply; not for the purpose of pointing out how it should be applied.

I cannot help thinking that in many of the cases in which this particular rule of presumption has been made of singular importance, it has been forgotten that the object of the law in directing that a disputable presumption of this kind should be made is simply to supply the place of evidence which is otherwise wanting in the case. And obviously a presumption by its very nature must have a foundation of fact to rest upon: it is, I understand, because certain facts are proved or established that an additional fact is presumed to exist, although there is no other evidence for or against it. And the reason, I suppose, for presuming it in the case of a disputable presumption, generally, is that if the proved facts exist, the existence of the presumed fact accords better with ordinary experience of the actual state of things than its non-existence. The presumption in truth is simply made because it is considered to afford a safe rule for the ascertainment of a fact without other evidence of it from a set of facts which are proved.

So that the rule of presumption of which we are speaking cannot alter the onus which lies on a plaintiff to make out his case: it only aids him in proving it. With the help of the rule, if it is applicable, he must make out all the facts necessary to his cause of action just as the plaintiff must do so in any other case.

Now, here, what is the set of facts which are in any degree proved on the side of

the plaintiff? At most it is this,—that the plaintiff and the defendants 2, 3, 4, 5, and 7 were members of a joint family; that this family had certain property; that amongst other properties, the godown which is the subject of the suit was one item, but that it was not ancestral property; that this item of property was bought in the name of Shumrun Lall while the family was joint; that after this event the family separated, and each of its members carried on his business separately; that the business which Shumrun Lall carried on was a saltpetre business, and that this godown was used by him exclusively in his saltpetre business.

That is the case presented on the side of the plaintiffs. It is said that, even if the plaintiffs cannot succeed in this case without proving any facts at all, as it was at first contended that they could, these facts are at any rate sufficient for them.

I think it may be useful here to read a passage from a judgment of the Privy Council* to which I referred yesterday, but which I had not then at hand for the purpose of quoting. The passage is as follows:—"The judgment was delivered on the 27th March, the last of the Privy Council judgments which have yet been reported to this Court. The question in that case was a question relative to the right, title, and interest of one Ram Soondur Sen. The passage which I desire to read is this:—"It is not disputed that Ram Soondur was a member of this joint and undivided family. The status, however, of the family was peculiar. Mr. Justice Loch says (and neither party has disputed the accuracy of the description), 'The evidence of the witnesses and of those members of the family who have been examined clearly shows that though the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house at Koredea, they also had separate dealings and funds of their own. The facts thus brought to our attention render it impossible for us to look upon the family as a joint Hindoo family in the ordinary sense of the term, that is, as a family having all things in common; all acquisitions being made from the joint funds of the family, and all members being entitled to share in the benefits of any property held in the name of any member of the family. It is clear to us from the evidence that, while the family

* 19 W. R., 356.

"have some ancestral property in joint possession, some of the members of the family acquired separate property from their own funds and dealt with it as their own without reference to the other members of the family." The Privy Council go on to say:—"Such a state of things may in their Lordships' judgment be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindoo law as to property in the name of one member of a joint family; and to throw upon those who claim, as joint property, that of which they have allowed their coparcener, trading and incurring liabilities on his separate account, to appear to be the sole owner, the obligation of establishing their title by clear and cogent evidence."

It is quite clear then that the Privy Council in the case which I have just cited were of opinion that the presumption of law which has in the present case been appealed to may be qualified by the circumstances even of the case which is put forward by the plaintiff.

To some extent it is apparent that the facts with reference to which their Lordships' observations were made do, in very material particulars, resemble the case which is before us now. It appears to me then that taking the plaintiffs' case as it stands on the record, the presumption which the plaintiffs ask us to make in their favor is, to use the language of the Privy Council, very much weakened indeed, if it is not absolutely rebutted, by their own facts.

Then on turning to the side of the defendant, I find there evidence which makes it clear beyond all doubt in my mind that the property which is the subject of the suit was acquired by Shumrun Lall by purchase in 1862, probably no doubt at a time when according to the plaintiff's facts of the case, the family was joint; but that it was bought and paid for by Shumrun Lall, apparently, so far as the vendor could perceive, for his own purposes; that it was used by him alone personally from that time forwards; that he paid rent for it to a Gossain or head of a certain religious establishment which had a right to receive the rent, or part of the rent, until the time when the final alienation which is complained of took place in February 1871. In the meanwhile, namely, in May 1868, the property had been mortgaged by Shumrun Lall to Mr. Lingham in order to secure a

debt of his own; and somewhere about 1865 or 1866 before this mortgage was effected (at any rate according to the plaintiff's own witnesses) the separation of the family, which I have already mentioned, took place. We then find this property notwithstanding these facts still going on in the hands of Shumrun Lall, used by him for the purpose of his separate business, and sold in execution of the decree which Mr. Lingham got over it, and in this manner transferred to the principal defendant.

I do not hesitate to say that upon this evidence I am perfectly satisfied, judging from that which occurred after the period of separation of the family, as well as from that which occurred before, that this property was Shumrun Lall's own separate property, and that the plaintiffs had no share whatever in it. If it is urged, as was put to us during the argument, that all these facts avail nothing against the presumption which the Hindoo law directs the Courts to make, I feel bound to say that this proposition is so far as I understand the law entirely erroneous. It would be an absurdity in my mind to maintain that the disputable presumption which has for its purpose the ascertainment of an actual fact should be allowed to override the strongest possible evidence negating the existence of that fact.

It has been pressed upon us that the only mode of rebutting this presumption which is allowed by law is to enquire where the purchase-money came from,—and to be guided solely by the result. If this be so, the defendant in a case of this kind is by the law gratuitously confronted with a difficulty which is in most cases almost insuperable. No doubt, wherever such an enquiry can be pushed and a satisfactory answer to it arrived at, it does offer the best possible means of ascertaining the actual state of relevant facts. But I altogether dissent from the argument which has been pressed upon us to the effect that no other course can in law be pursued for the purpose of meeting the presumption. Two or three judgments, one of them certainly of the Privy Council, were no doubt referred to in support of this argument. But it seems to me, without going back to the words which were actually used in those judgments, that this particular mode was in no case laid down as the *only* mode in which the presumption could be met; it was simply spoken of as being a very useful and a very satisfactory mode whenever it could be effectively pursued. In the very last case,

which, I have already referred to, of the Privy Council's judgments, their Lordships say:—"It need hardly be observed that, on the trial of the issue now under consideration, the principal fact to be ascertained was the source from which the purchase-money of the property in question was derived, i.e., whether it came from the common family chest at Koredea in Beerbhoom, or from the separate funds of Ram Soondur employed by him in carrying on his business, admitted to be separate, at Khagra near Moorshedabad." A good deal of evidence bearing on the affirmative or negative of that fact seems to have been adduced by both sides. Therefore, as there was such evidence existing and available in that case, no doubt, it was a very useful mode, probably the only proper mode, of meeting the presumption. And probably, also, whenever the disputing parties are members of the same family, evidence upon this point may be reasonably expected. But when, as in the present case, the defendant is a stranger to the family, and his vendor tacitly takes part with the plaintiffs, it is absolutely beyond reason to require that the defendant, so situated, should give evidence as to whence the original purchase-money came. And to the best of my judgment no decision which we are bound to follow lays that this criterion is indispensable.

appears to me, then, on the whole, that ought to find no difficulty whatever in winning this suit upon the evidence which has been laid before us. I am satisfied for the reasons which I have stated that the judgment of the Lower Court is quite correct, and therefore I would dismiss the appeal with costs.

inslie, J.—It appears to me that, on the evidence in this case, the plaintiffs have not succeeded in establishing that this property was ever enjoyed by them as part of the joint family property. In 1862, when this property was acquired, the family no doubt was a joint undivided family; and it may be of course that Shumrun Lall who conducted the business of the godown was conducting it as manager for the whole family. On the evidence I think it is quite clear that nobody but Shumrun Lall has ever taken any part in the conduct of the business, in paying the rent, or doing any other act which may be evidence of ownership. Then about the year 1866 there was a separation in the family, and after that separation Shumrun Lall continued in sole charge

occupation and enjoyment of the godown. And in 1868 he entered into that transaction which has led to this suit. If, after the separation, Shumrun Lall is to be taken still to be the manager of the family as before, it seems to me that the plaintiff was bound to give evidence of the arrangement with regard to the property that was entered into at the time of the separation; and that in the absence of that evidence (whatever might be done for the period up to 1866), we cannot assume that Shumrun Lall any longer represented any person except himself. There is absolutely no evidence as to the conditions on which the family separated, or as to what property they had at date of separation, how it was divided, and how it was held afterwards. It appears to me that on this state of facts, we ought to hold that Shumrun Lall since the time of the separation has undoubtedly been occupying this property as his own. And having found this fact, I think that we are not only at liberty, but we are obliged to apply it to the issue which was raised, namely, whether at the time of the acquisition of the property it was acquired for the whole family, or for Shumrun Lall separately. The appellant relies upon a presumption of law, that all property held by any member of a joint family during the time the family is joint, is the property of the joint family. But that presumption is one which is capable of being rebutted; and it seems to me that this unexplained fact that the whole of this property after separation came into the hands of Shumrun Lall alone, is evidence sufficient to rebut that presumption.

With reference to the case that was cited from the VIII Weekly Reporter, which was said to have laid down as a rule that it was absolutely necessary to prove the source of the purchase-money, I would observe that where it is possible and where there is evidence on that point, it is no doubt a most important fact. If in any case it can be determined in at all a satisfactory manner, it would probably be conclusive. But where no evidence whatever is given on that point, I do not think that the Court is bound to reject other evidence which may bear upon the merits of the case: if this were done, most serious injustice might, as pointed out by my learned brother, be done in almost every case where the parties who can furnish the necessary evidence to prove the source of the purchase-money have a strong interest in combining to withhold it. I concur in dismissing this appeal.

The 15th May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Ejectment—Lease by Co-sharer—Right of Occu-
pancy.*

Case No. 126 of 1872.

*Regular Appeal from a decision passed by
the Subordinate Judge of Tirhoot, dated
the 11th March 1872.*

Mr. Hamilton, Mookhtar on the part of
Messrs. Gisborne and Co. (Defendants)
Appellants,

versus

Rajah Rughoon Nandun Singh Bahadoor
(Plaintiff) *Respondent.*

Mr. R. T. Allan and Baboo Chunder
Madhub Ghose for Appellants.

Messrs. R. E. Tvidale and C. Gregory for
Respondent.

In a suit by a co-sharer for ejectment of a lessee who was holding over after the expiration of his lease at the end of 1275 and after sufficient notice, defendant pleaded a pottah from plaintiff's shareholder under which he was entitled to remain to the end of 1282:

Held, that as defendant's occupation and enjoyment of the land to the end of the year 1275 had been by virtue, and under the authority of two separate leases granted by each shareholder, each co-extensive with his share only, and as that granted by plaintiff had expired in 1275, defendant had not had exclusive enjoyment of the property as tenant by virtue of the other lease. And though the other co-sharer had granted a new lease when the first lease expired in 1275, yet as plaintiff refused to do so, and has ever since treated defendant as a trespasser, defendant had no right of occupation so far as regarded plaintiff's share.

Phear, J.—At first we were disposed to think that the defendants had shown a holding over after the expiration of the lease in 1275, and that the plaintiff had not proved that that holding over had been terminated by sufficient notice, and so made out that the contingency had happened upon which he was entitled to bring this suit. No doubt the defendant has been in the beneficial occupancy of the land since 1275, that is for a period of three or four years after the expiration of the lease from the plaintiff, and before the date of the suit. But it has now

been made to us satisfactorily clear that the plaintiff did promptly upon the expiration of the lease in 1275 claim all the lands, and was on / stopped from taking active measures for repossessing himself of the land by the interference of the Magistrate, and on that occasion Mr. Hamilton on behalf of the factory did admit that his holding under the lease of 1275 was come to an end, and did further make an offer to continue on so far as the present plaintiff's share was concerned under entirely new terms. We think that the lease which expired in 1275 is unmistakeably of a middle tenure character, while the terms which were offered by Mr. Hamilton on the occasion which we have referred to were purely ryotee terms. This being so, we can come to no other conclusion than that Mr. Hamilton admitted that at that time he had no right of holding these lands so far as regards the share of the present plaintiff; that he desired to be able to hold them and sought the commencement of another tenure. But the plaintiff refused, and from that time forwards till the time of bringing the suit persistently refused to have Mr. Hamilton as his tenant, or to acknowledge him as his lessee on any terms. In other words, from the expiration of the lease in 1275 till the date of bringing the suit, it seems to us now clearly made out that the defendants were trespassers upon the land from which the plaintiff seeks to eject them so far as regards the plaintiff's share. There is, therefore, nothing on that ground to prevent the plaintiff from claiming the repossession of the land:

It was, however, argued on behalf of the defendant that notwithstanding the lease which terminated in 1275, the defendant had really been occupying the land as a ryot, and had by lapse of time acquired the right of occupation under the rent law.

It appears to us that almost everything in the evidence is against this contention. The terms of the lease itself are certainly so; the evidence of the plaintiff's witnesses, if it can be trusted at all, is also against it; and then there is the offer of Mr. Hamilton which we have already referred to, and which is in itself pretty nearly conclusive on the point. We think that there is really no ground for holding that the defendant has acquired a right of occupation under the rent law to this land.

There is but one other ground upon which the defendant has contended that he is entitled to resist the plaintiff's claim. He says that whatever may be the case as

regards the plaintiff himself, he has been let into enjoyment of this land by the plaintiff's co-sharer; that he has continued in the use and occupation of the land for a great number of years in this way, and that he has at this very time a pottah from the co-sharer under which he is entitled to remain where he is until the year 1282. He urges on this state of facts that the plaintiff cannot turn him out of possession. And in support of this argument he has referred to a decision of a Division Bench of this Court, reported in XIV Weekly Reporter, page 183. In the course of the judgment which was delivered in that case it was said by the learned Judge who delivered the judgment:—"I do not know of any authority which says that one part-owner can, when the land is held jointly and there has been no partition of it, insist upon a person who has been holding under the other part-owner for sixteen or seventeen years being turned out, and the possession of the land being given up to him."

It appears to us that this passage does not in truth favor the defendant, because the state of facts contemplated in that judgment is in no degree parallel to the facts of this case. If the present defendant could satisfy us that one co-sharer had put him into exclusive possession of the joint property, and maintained him in that possession for sixteen or seventeen years, or we will even say for a lesser number of years, say six or seven years, it is more than probable that we should not, unless this fact itself were very clearly explained away by him, think that the plaintiff had made out a right to turn the defendant out of possession, because it might well enough be that the joint property was as between the sharers of it enjoyed in such a way as gave one co-sharer the right to give exclusive possession to a tenant of a certain portion of it. The fact that such an exclusive possession had been in that way obtained and enjoyed for a long period of years would as against the other co-sharer have the effect of throwing upon him the burden of showing that his co-sharer had not in fact the right as against him to give that exclusive possession. Here, as regards that point, the case we may say is wholly different. The defendant has not had exclusive possession of the land which is the subject of suit by virtue of and under the authority of the plaintiff's co-sharer only. On the contrary, the occupation and enjoyment which he has had of it up to the end of the year 1275 was by virtue of and under the authority of two

separate leases granted by each co-sharer, each co-extensive with his share only. One of those leases—that given by the plaintiff, or rather by the plaintiff's predecessor—expired in 1275; and from that time till the date when the suit is brought, the defendant certainly has not had exclusive enjoyment of this property as tenant by virtue of the other lease. The other co-sharer, no doubt, granted a new lease at the time when the first lease expired in 1275, but the plaintiff refused to do so, and from that time has been continually treating the defendant as a trespasser. If we held that the continuing on under the circumstances which have been disclosed in this case, was a quiet possession of the whole land under the authority of the lease of one co-sharer only, and that that was a sufficient authority to justify the exclusive possession, we should really go to the length of saying that one co-sharer could by letting the land to a tenant exclude his co-sharer entirely from the possession of it notwithstanding his most earnest efforts to the contrary. And this would be a very long way further we think than this Court has ever before gone. Thus it seems to us that the authority which has been referred to is truly no authority whatever in support of the position which the defendant takes up. Then we have it simply standing thus, namely, that so far as regards the plaintiff's share, which has now relative to his co-sharer become exclusive in the property which is the subject of suit, the defendant has no right of occupation whatever under any lease, written or parol, express or implied; but he has in truth, as far as the plaintiff is concerned, been a trespasser ever since the year 1275. Consequently the plaintiff has a right to succeed in this suit.

The Lower Court has decreed possession of all the lands to the plaintiff with the exception of 5 beegahs in plot No. 28 upon which it seems that the pucca building of the factory stands, and with regard to which it has been decreed that the defendant may hold and occupy as a tenant at a fair and equitable rent. There has been no objection raised to this part of the decree excepting so far as Mr. Allan says that that portion of the land is held on a mokururee tenure. But it turns out that there is no evidence on the record to support that contention. An application was made to the Court below to allow an alleged copy to be taken of a mokururee lease ledgered in the register as evidence of this tenure. But the application was refused. It seems to us, as far as we have

means of judging on the point, that the application was rightly refused. At any rate, we have not got any means whatever now before us upon this point. And, consequently, the objection to this part of the decree upon that ground we think wholly fails.

We think, therefore, on the whole, that the appeal must be dismissed with costs.

The 15th May 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Fictitious Sales—Right of Action.

Case No. 1025 of 1872.

Special Appeal from a decision passed by the Judge of Jessore, dated the 23rd April 1872, affirming a decision of the Subordinate Judge of that district, dated the 16th January 1871.

Bibee Tamaoonnissa (Plaintiff) *Appellant*,

versus

Woojjulmonee Dossee and others
(Defendants) *Respondents*.

Baboo Bungshee Dhur Sen for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

In the Courts in India, when a suit is brought to recover property, it ought to be brought by the real owner, and not by a person who claims to be owner by virtue of a transaction which is found not to be a real one.

Couch, C.J.—THE Subordinate Judge says :—"I am of opinion that the purchase

"alleged by the plaintiff was a fictitious transaction which did not give her any right to the property in question." I understand by that that there was no sale at all, that the instrument of sale was merely colorable, and that what purported to be a conveyance of the property was not intended to operate as such.

Then the Judge says :—"The only question to be decided in the present appeal is whether the sale to the plaintiff by Kinoo Moolla and others was a *bonâ fide* one, or whether it was, as held by the Subordinate Judge, fraudulent and collusive." He changes the language. It is to be regretted that he was not more precise. But another part of his judgment contains this passage :—"Had the sale been a *bonâ fide* one and a real conveyance of the property made for money received, it is quite impossible that the vendors would have made mistakes as to the place where the deed was executed and the amount of money paid to them." That shows I think that he was considering the case, notwithstanding he has used the words fraudulent and collusive, in the same way as the Subordinate Judge did, and considering whether this was a real sale or not. He has found that it was not a real sale, taking the same view of the transaction as the Subordinate Judge.

Then can the plaintiff maintain this suit when it is found that there was really no sale to her, that all that took place was the preparation of a paper which professed to be an instrument of sale, but was not intended by the parties to have any such effect. I think in the Courts in India, where a suit is brought to recover property, it ought to be brought by the real owner, and not by a person who claims to be owner by virtue of a transaction which is found not to be a real one.

The objection now taken which arose upon the judgment of the Subordinate Judge, that it is immaterial whether in the present suit the transaction was real or not if the vendor admitted that he did sell, ought to have been raised in the appeal to the Judge. I do not think that, even supposing it was an objection of any weight, we ought to allow it to be raised now.

The appeal ought to be dismissed with costs.

Glover, J.—I concur.

The 15th May 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Issues—Review—Costs—Special Appeal.

Case No. 1028 of 1872.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Chittagong, dated the 1st April 1872, reversing a decision of the Moonsiff of Sathaneah, dated the 13th February 1871.

Raimgutty Surmah (Plaintiff) Appellant,

versus

Abdool Ali and others (Defendants)
Respondents.

Baboo Bykunt Nath Pal for Appellant.

Baboo Aukhil Chunder Sen for Respondents.

Where a plaintiff rests his case on a mortgage as well as upon a deed of sale, and fails in that part which rests upon the deed of sale, he is entitled to what the mortgage would give him if valid.

Where a plaintiff applying to the Lower Appellate Court for a review neglects to point out an omission, he is not entitled to the costs of the special appeal which is necessary to have it corrected.

Couch, C.J.—THE plaintiff rested his case upon a mortgage as well as upon a deed of sale, the mortgage being admitted to be made before the sale under which the defendant claims. It is necessary in order to dispose of the plaintiff's case to determine whether there was a mortgage as he alleged, because if there were, although he might fail in that part of the case which rested upon the deed of sale, he would be entitled to what the mortgage would give him. The Subordinate Judge has dismissed his suit entirely without taking any notice of the question whether there was a mortgage. The case must therefore be remanded to the Lower Appellate Court to try the question whether there was a valid mortgage such as the plaintiff alleged. If it finds that there was, it will pass a decree in favor of the plaintiff according to the right given by it; if not, the suit would be properly dismissed.

As to the costs of this appeal, the plaintiff ought, when he applied for a review, to have pointed out this omission on the part of the Lower Appellate Court. He did not do so, and therefore he must have no costs of the appeal to this Court to have it corrected. The decree of the Lower Appellate Court will be reversed, and the suit will be remanded as I have said.

Glover, J.—I concur.

The 15th May 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Act VIII of 1859 s. 237—Jurisdiction.

Cases Nos. 976 and 977 of 1872.

Special Appeals from a decision passed by the Judge of Sarun, dated the 23rd March 1872, affirming the decisions of the Sudder Moonsiff of that district, dated respectively the 20th February and 13th July 1871.

Debee Pershad (one of the Defendants)
Appellant,

versus

Gujadhur Ram and others (Plaintiffs)
Respondents.

Mr. C. Piffard for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Plaintiffs having obtained decrees upon certain hoondees against K and P, applied under Act VIII of 1859 s. 237, for payment of certain moneys which had been deposited in Court in a suit in which one D was the plaintiff, and which had been attached by them. The ground of their application was that D had recovered a decree upon certain hoondees which had been fraudulently transferred to him by K and P. The Moonsiff holding that the question of the ownership of the decree could not be determined in the Miscellaneous Department, referred the applicants to regular suits. These were accordingly instituted, and the transfer to D declared to be fraudulent and colorable:

Held, that the question of the title of the plaintiffs as against D to have their debt paid out of the money in deposit ought to have been decided in the Court in which the money was in deposit. The Moonsiff was in error in directing applicants to a regular suit.

Couch, C.J.—THESE special appeals, Nos. 976 and 977 of 1872, were brought in two suits, in which Narain Ram and another were plaintiffs and Debee Pershad and others were defendants. The facts in

these suits were that the present plaintiffs, having obtained decrees upon certain hoondees against one Kashee Ram and one Puriag Ram, applied under Section 237 of Act VIII of 1859 for the payment to them of certain moneys which had been deposited in Court in a suit in which Debee Pershad was the plaintiff, and had been attached by them. The ground of their application was that Debee Pershad had recovered a decree upon certain hoondees which had been transferred to him by Kashee Ram and Puriag Ram, as the plaintiff alleged, fraudulently; that in truth the money in Court really belonged to Kashee Ram and Puriag Ram, and that the transfer of the hoondees to Debee Pershad by them was colorable, and did not pass the property in the hoondees as against the creditors of Kashee Ram and Puriag Ram.

The application was made to the Moonsiff of Sarun on the 31st of August 1870. He held that the question of what he called the real and fictitious ownership of the decree "should not be determined in the Miscellaneous Department, and that it would seem fit and proper, in the circumstances of the case, that the question of the real and fictitious ownership of Debee Pershad, the decree-holder, should be decided in a regular suit," and he ordered that the decree-holders in his Court, Gujadhur Ram and Narain Ram and Deokulidin Ram, the decree-holders in the Court of the Subordinate Judge, and the present plaintiffs should seek a remedy by a regular suit.

Accordingly, two suits were brought: one, which is the subject of appeal No. 976, in the Court of the Moonsiff; and the other, which is the subject of the appeal No. 977, in the Court of the Subordinate Judge. As we understand, the reason for bringing the suits in that way was the amount which was claimed by the plaintiff in the one suit and in the other.

Both Courts have decided that the transfer of the hoondees to Debee Pershad by Kashee Ram and Puriag Ram was a colorable and fraudulent transaction; that the proceeds of the decree which Debee Pershad has obtained against the persons liable upon these hoondees in reality belong to Kashee Ram and Puriag Ram; and that Debee Pershad must be considered as entitled to receive that money on their behalf, being, in fact, a trustee for them. But it has been objected in special appeal, that, according to Section 237 of Act VIII, this question

ought not to have been determined by a suit being brought as has been done, but that it should have been determined by the Court in which the money was deposited, and in a miscellaneous proceeding.

Section 237 provides that when the property which is attached consists of money or any security in deposit in any Court of Justice, any question of title or priority which may arise between the decree-holder and any other person not being the defendant claiming to be interested in such money or security by virtue of any assignment pledge or otherwise, shall be determined by the Court in which such money or security is in deposit. Now this money could only have been attached at the instance of the plaintiffs and in execution of their decree on account of its being the property of Kashee Ram and Puriag Ram. The words of the Section are, "which is or may become payable to the defendant." If we were to read those words literally, it might be difficult to say that this money was payable to Kashee Ram and Puriag Ram, or to Debee Pershad on their behalf. The real case is that it was payable to Debee Pershad, but when received it would be held by him as trustee for the others, and they would have the beneficial interest in it. But we think in considering what is meant by Section 237, we must look at the general design of the Section. This is that where money or a security is deposited in a Court of Justice, any question of title or priority arising between the decree-holder and other persons than the defendant shall be determined by that Court,—the reason, apparently, being that there may not be an unseemly conflict between the Courts. If there was not this provision, it might often happen that a Subordinate Court, the Court of a Moonsiff, would be determining a question of title to money deposited in a higher Court and making an order as to what should be done with it, but not having by law the means of obliging the other Court to comply with the order. And possibly the other Court may have a different opinion. It seems to us to have been the design of the Section that any question of this kind, where the money being deposited in Court, there was a Court to determine it, should be determined by it. In construing Acts of the Legislature, we must look at the general design of the Act, and, this being the general design of the provision in Section 237, it appears to us that this is money which comes within its meaning, and that the

question of the title of the plaintiffs, as against Debee Pershad, to have their debt paid out of it was one which ought to have been decided in the Court in which the money was deposited. The Moonsiff, when he told the parties that they must bring a regular suit, was in error.

When the case was argued before us, it was suggested that one of the suits, that which is the subject of appeal No. 976, had been brought in the Court in which the money was deposited, namely, in the Court of the Moonsiff, and the only defect there would be, that instead of the question being determined in a miscellaneous proceeding it had been determined in a regular suit. If that had been the case, we think there would not be a ground of special appeal. It would have been only an error in the procedure, a wrong form of proceeding, but still there would have been a decision of the Court required by law to decide the question. But on reading through the judgment in that case, we find it stated, and we do not see anything in the proceedings to the contrary, that part of the money which was the subject of the suit in the Moonsiff's Court, and for which a decree was sought, was deposited in that Court and another part in the Court of the Subordinate Judge. If this were so, as the Moonsiff had not power to deal with the money which was in the Court of the Subordinate Judge, it would be something more than an error in procedure.

As to the suit which was brought in the Court of the Subordinate Judge and is the subject of appeal No. 977, it was admitted that it was not brought in the Court in which the money was deposited. Therefore, in both these cases, the objection which was taken that Section 237 applied and that the suits were not properly brought must prevail. But the plaintiffs have been put into a very difficult position by the judgment of the Moonsiff. They have obeyed his order and brought the suits, and now upon this objection being taken they find that they must fail. It is an objection which, although we are obliged to give effect to it, is not of such a nature as to entitle the successful party to receive any costs, not even any of the costs of the suit. What we must do is to reverse the decision of the Courts below, and order the suits to be dismissed, but without costs; and we recommend that an application should be made to the Moonsiff to review the order of August 1870, notwithstanding the lapse of time which has now taken place.

The 16th May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Suit for a Pottah—Rates of Rent—Right of Occupancy.

Case No. 979 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 10th April 1872, affirming a decision of the Moonsiff of Arrah, dated the 30th September 1871.

*Uthur Hossein and others (Defendants)
Appellants,

versus

Ramphal Roy (Plaintiff) *Respondent.*

Baboo Unnoda Pershad Banerjee and Moonshee Mahomed Yusoof for Appellants.

Mr. R. T. Allan and Baboo Chunder Madhub Ghose for Respondent.

Plaintiffs sued as ryots to obtain a pottah corresponding with a kubooleut which they said had been taken from them by defendants who were 12-anna shareholders in the land, and according to an alleged promise to give them a pottah. Plaintiffs failed to make out the ground on which they relied, but the Lower Appellate Court being of opinion that plaintiffs had made out a right of occupancy under the rent-law, and were entitled to obtain a pottah from the zemindar at a fair and equitable rate of rent, and finding no evidence as to what such a rate would be, gave them a decree at the old rate:

Held that the decision was erroneous, as there was no evidence on which the question of a fair and equitable rate could be determined, and as it rested on a ground not taken by the plaintiffs who came into Court on a special contract. If plaintiffs' right to a pottah had rested on the ground of their being occupancy ryots, they might claim a pottah from all the 16-anna shareholders jointly, and the remaining 4-anna shareholders ought to have been made parties, and the case remanded for trial by the first Court.

Phear, J.—We think that there has been an error committed by the Court below. The plaintiffs sued as ryots to obtain from 12-anna shareholders in the land a pottah corresponding with a kubooleut which they said these 12-anna shareholders had taken from them, and according to the promise to give them a pottah contained in the chittee which they also say was exchanged at the same time.

It appeared at the trial that this kubooleut, if it was given at all, was given not to all the 12-anna shareholders, but to one only among them, to one who was entitled to some 3-anna share only, and that the pottah

or promise to give a corresponding pottah was at the best a document which bound him only.

The same view of the evidence was taken by the Lower Appellate Court; and consequently the Lower Appellate Court came to the conclusion that the plaintiff had failed to make out the ground on which he relied when he brought his suit for the purpose of obtaining a pottah from 12-anna shareholders. But the Lower Appellate Court is further of opinion upon the evidence that the plaintiff had made out by that evidence that he was entitled to the right of occupancy which is given by the rent-law, and consequently as occupancy ryot he was entitled to obtain from the zemindar a pottah at a fair and equitable rate of rent. The Court said that there was no evidence before it upon which it could arrive at a conclusion as to what would be, as a matter of fact, a fair and equitable rate of rent to be paid for the land. But it was of opinion that according to the terms of the rent-law, it was under those circumstances right and fair to assess the rent at the old rate. So that in the end, the Court, while it was of opinion that the special ground upon which the plaintiffs had come into Court failed them, gave them a decree against the 12-anna shareholders for a pottah at the old rate.

It seems to us that this decision is erroneous, because (probably owing to the very fact that the plaintiff came into Court upon a special ground) there was no evidence, as the Judge himself said, upon which the question as to the fair and equitable rate of rent could be determined. Had the plaintiff rested his case upon the ground which the Lower Appellate Court has found to be established, namely, that he was a ryot entitled to a right of occupancy, he would of course in this way have challenged the defendant to prove what was the fair rate of rent according to plaintiff's allegation in respect of it. Instead of that, the plaintiff came into Court upon a special contract. The defendants must be taken to have known very well that they had not bound themselves by the special contract alleged by the plaintiff, and that therefore they contented themselves with meeting the plaintiff upon that ground alone. But more than that: the plaintiff did not prove, as we understand, that the 12-anna shareholders had severed themselves from the 4-anna shareholders; and consequently the right to a pottah which he had upon the ground of his being an occupancy ryot was a right to obtain a pottah from all the 16-anna shareholders

jointly, and not from the 12-anna shareholders separately. If then the Court allowed the change of character in the suit to be made at all, it ought to have sent back the case to be tried by the first Court upon fresh evidence, with the direction that the remaining 4-anna shareholders should be added as party defendants jointly with the 12-anna shareholders. No doubt the Appellate Court did put the 4-anna shareholders on the record by virtue of its powers under Section 73 of the Civil Procedure Code. But this alone did not have the effect of starting the trial afresh between the new parties in the way in which we have just now mentioned. That was the only course which could have been taken in order to obtain a fair decree between the parties. And it is obvious, we think, that it needed only to be described in order that it should be seen at once that it is a total change in the nature of the suit.

For all these reasons, we think that the decree of the Court below cannot be supported, and that it must be reversed and the plaintiff's suit must be dismissed with costs in all the Courts.

The 17th May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Rent Suit by Shareholder—Onus Probandi.

Case No. 978 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 31st January 1872, modifying a decision of the Moonsiff of that district, dated the 30th September 1871.

Mussamut Lalun (Defendant) Appellant,

versus

Hemraj Singh (Plaintiff) Respondent.

Messrs. R. E. Twidale and C. Gregory and
Moonshee Mahomed Yusoof for Appel-
lant.

Baboos Kallee Mohun Doss, Bhowanee
Churn Dutt, and Luckhee Churn Bose
for Respondent.

In a suit for rent by a shareholder, where defendant contends that he is not bound to pay otherwise than by entirety to the person entitled to the whole rent, the onus is on plaintiff to show that he is entitled to sue for a fractional portion.

Phear, J.—The plaintiff in this case sues as pccadar of $7\frac{1}{2}$ annas of the mouzali to

recover 7½ annas out of the 16 annas rent due from the defendant as a ryot.

The defendant answers that the plaintiff has no right to sue for a fractional share of the rent, and that he is not bound to pay his rent otherwise than by entirety to the person entitled to the whole rent. Thus challenged, we think the burden lay upon the plaintiff to show that he had a right to sue for a fractional portion of the rent, as he had sued. He could do this either by proving that the defendant had paid him separately as a matter of practice before the time when the suit was brought, or that he was bound to do so under an agreement now and henceforward at any rate. He does not pretend that there was any agreement made by the defendant to pay in this way. It is certain that for two years immediately preceding the suit the payment had been by entirety. And the only thing that the pleader for the plaintiff can now rely upon is a receipt which is said to have been taken by the defendant sometime before that time for rent, and is signed by one shareholder only. This seems to us altogether insufficient to establish the right which the plaintiff was bound to make out before he could sue the defendant. And therefore we think that the Lower Appellate Court has made an error in law in giving a decree to the plaintiff. It seems to us that the plaintiff's suit ought to have been dismissed. Accordingly we reverse the decision of the Lower Appellate Court, and dismiss the plaintiff's suit with costs in all the Courts.

The 17th May 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Splitting of Causes—Appeal—Reversal of Sale.

Case No. 946 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 13th March 1872, reversing a decision of the Moonsiff of Nasirnuggur, dated the 29th December 1870.

Shaikh Nagar (Defendant) *Appellant*,

versus

Shuriutoollah and others (Plaintiffs)
Respondents.

Baboo Chunder Madhub Ghose for Appellant.

Baboo Nullit Chunder Sen for Respondents.

Two suits brought by different parties claiming different interests in a certain share to set aside the sale of that share having been dismissed, one of the plaintiffs appealed, and the sale was set aside:

Held that the decision must be considered as setting the sale aside as to the whole of that share, although the other parties did not appeal.

Couch, C.J.—THE case of the defendant was that the sale of both the shares had been set aside, and the plaintiff, therefore, had no title to recover any rent, his title being that of a purchaser at those sales.

It is admitted in the plaint that the sale of the share of Brindabun had been set aside, and there is no question about that; but as to the share of Rai Chund, it is said, and it is the fact, that two suits were brought by different parties claiming different interests in that share to set aside the sale of it, and both the suits were dismissed by the first Court; but there was an appeal in one of them only, and in that the sale was set aside.

It appears to us that this decision must be considered as setting the sale aside as to the whole of that share, although the other parties did not appeal. If they both had joined in one suit, but only one had appealed, the decree of the Appellate Court would have been for the benefit of both, and the whole sale would have been set aside. Their bringing separate suits instead of joining in one suit ought not to make any difference in that respect, and this seems to be in accordance with the decision of this Court in II Weekly Reporter, page 248.

The Judge appears to have fallen into a mistake in regard to Brindabun's share having been set aside by the decree of the High Court. It is clear that what was done was with reference to the share of Rai Chund. It is not necessary for us to send the case back that the mistake may be corrected. We can see clearly upon the facts which have been found that the plaintiff has no title to recover. We must reverse the decree which has been appealed from, and order the suit to be dismissed with costs.

The 19th May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*,
Chief Justice, and the Hon'ble Louis
S. Jackson and Dwarkanath Mitter,
Judges.

*Regulation V of 1827 s. 3—Act VIII of 1859
s. 200—Attachment—Precept to Collector—
Jurisdiction.*

The Collector of Noakhally, on behalf of
Government, *Petitioner*,

versus

Mr. E. Paxwell, *Opposite Party*.

*Baboo Unnoda Pershad Banerjee for
Petitioner.*

Mr. J. T. Woodroffe for Opposite Party.

On an application under Act VIII of 1859 s. 200, the Judge ordered the attachment of certain properties, and thereafter sent a precept to the Collector under Regulation V of 1827, and ordered him to hold the properties in question and two others in attachment, and to appoint a person for the due care and management of the same:

Held, that Regulation V of 1827 was not intended to apply to any other cases of attachment of landed property than those provided for in the Regulations mentioned therein, and the order was therefore made without jurisdiction.

Couch, C.J.—In this case a rule was granted by the learned Judges who are now sitting with me, upon reading a petition of the Collector of Noakhally on behalf of the Government, directing the District Judge of Chittagong and the decree-holder to show cause before this Court why the order passed by the Judge, in execution case No. 1 of 1872, on the 13th of January 1873, should not be set aside. The facts relating to the making of that order which are stated in the petition of the Collector are these:—That Mr. F. A. Courjon of Chittagong brought a suit against Mr. E. Paxwell in the Court of the Judge of Chittagong to have it declared that the lease of the Government Mehals, Chur Boodoo and Luckhieekhas, taken from the Collector of Noakhally by the said Mr. Paxwell, was in trust for Mr. Courjon, and to have an assignment executed by the former in favor of the latter; that in the said suit, Mr. Courjon also prayed for an account of the profits which came into the hands of Mr. Paxwell, and for the recovery of the balance; that the District Judge of Chittagong gave Government notice of the institution of the above suit, upon which the

Collector of Noakhally appeared on behalf of Government and was made a defendant; that the District Judge declared that the lease was in trust for the plaintiff, and ordered Mr. Paxwell to execute an assignment of the lease in favor of Mr. Courjon, and to render to him an account of the profits; that thereupon Mr. Courjon applied to the said Judge for execution of his decree, and Mr. Paxwell was ordered to submit his account-books of the profits and disbursements in connection with the property decreed; that Mr. Paxwell failing to submit the account-books, Mr. Courjon applied under Section 200 of Act VIII of 1859 for attachment of the aforesaid properties, Chur Lukhee and Chur Boodoo, and the Judge ordered that the properties might be attached and kept under attachment until further order; that thereafter the Judge, on the 23rd September 1872, sent a precept to the Collector under Regulation V of 1827 and ordered him to hold Churs Lukhee, Boodoo, and two others named in the petition in attachment, and to appoint a person for the due care and management of the same; that thereupon the Collector applied to the Judge for a consideration of the above order, dated the 23rd September 1872, and that the Judge, for reasons stated in his decision, rejected the petitioner's application.

The question we have to determine is whether the order of the 23rd September 1872 is a legal order. In considering the legality of it, we have first to determine what is the right interpretation of Regulation V of 1827. The enacting part under which the order was made is the 3rd Section, and the words to be interpreted are "whenever the Zillah and City Courts may deem it just and proper under the provisions of the several Regulations above-mentioned to provide for the administration and management of landed property, the Court shall issue a precept to the Collector, &c." Is the word "whenever" controlled by the words "under the provisions of the several Regulations above-mentioned?" And was it the intention of the legislative authority that the power should be exercised only in cases to which the Regulations mentioned applied? In order to discover the intention, we may look at the preamble in Section 1 and also at the title of the Regulation, and here we find an inconsistency. The preamble says:—"Whereas it is expedient in all cases of the attachment of landed property under the orders of Courts of Justice that the management of the estate attached should

"be placed under the superintendence of the Collectors of land revenue." The title is "A Regulation for modifying the rules at present in force for the management of estates under attachment by orders of the Courts of Justice in certain cases." Taking the title, the preamble, and Section 3 together, it appears to us doubtful whether the Regulation was intended to apply to any other cases of attachment of landed property than under the Regulations mentioned, and the second Section is in accordance with this. There were at that time, as is shown by the Judge in his judgment on the review, other Regulations in force under which landed property might be attached. The Judge has merely enumerated them, but an examination of them may help us to discover whether Regulation V of 1827 was intended to apply to cases under them. Regulation XLV of 1793, modified by Regulation VII of 1825, was intended for the sale of lands, and the Board of Revenue on a copy of the decree of a Court of Civil Judicature being transmitted to it was empowered to direct the Collector to attach the lands ordered to be sold by deputing an Ameen to take charge of them, or by placing them under the nearest Revenue officer. An immediate, or at least, a speedy sale was intended, and it was not necessary to make any provision for the administration or management of the property. Section 22 of Regulation IV of 1793 empowered the Court to issue a precept requiring the Collector to depute an Ameen with a proper establishment of officers to sequester the lands and collect the rents and revenues, and therefore it was not necessary that Regulation V of 1827 should extend to these cases. Section 24 of Regulation VI of 1793 contained the same provision. Section 6 of Regulation V of 1798 makes no provision for the management of the property which might, according to it, be for some time under attachment, unless the words "shall be held in attachment during the appeal, or until such time as one of the parties may be able to give the required security, by the Collector, of the District wherein the land may be situated, at the expense of the party who may be ultimately declared entitled thereto" imply a power to employ persons for the care and management of the estate. We think they may be so interpreted. Thus it appears that the Regulations mentioned in Regulation V of 1827 were all that required to be modified, and probably all that were intended by the words "all cases" in the preamble; and

this favors the interpretation that the Regulation was not intended to apply to other cases. The reasoning of the Judge upon which the order is founded requires that it should have been the intention of the legislative authority in 1825 to provide, not only for cases of the attachment of landed property under the then existing laws, but for all cases that might exist under future laws; and he thinks that was the policy of the Regulation. But it is not probable that the Governor-General in Council in 1827 undertook to determine what would be expedient in 1850 or 1870. We think it is not a reasonable interpretation of the preamble to say that this was the intention. Therefore the passage quoted from Austin does not support the judgment.*

Supposing the Judge were right in his interpretation of the Regulation, it might still be doubted whether it authorized him to make the order; and the Courts cannot impose such a duty as this upon either a private person or a public officer without being plainly authorized by law to do so. Section 388 of Act VIII of 1859 says that, from and after the time when it shall come into operation, the procedure of the Civil Courts shall be regulated by that Act, and except as otherwise provided by it by no other law or

* The passage in question is the following:—

"It may happen that the author of a statute, when he is making the statute, conceives and expresses exactly the intention with which he is making it, but conceives imperfectly and confusedly the end which determines him to make it. Now, since he conceives its scope inadequately and indistinctly, he scarcely pursues its scope with logical completeness, or he scarcely adheres to its scope with logical consistency. Consequently, though he conceives and expresses exactly the intention with which he is making it, the statute, in respect of its reason, is defective or excessive. Some class of cases which the reason of the statute embraces is not embraced by the statute itself, or the statute itself embraces some class of cases which a logical adherence to its reason would determine its author to exclude from it. But in pursuance of a power which often is exercised by Judges (and where they are subordinate to the state, with its express or tacit authority), the Judge who finds that a statute is thus defective or excessive, usually fills the chasm or cuts away the excrescence. In order to the accomplishment of the end for which the statute was established, the Judge completes or corrects the faulty or exorbitant intention with which it actually was made. He enlarges the defective, or reduces the excessive, statute, and adjusts it to the reach of its ground.

"For he applies it to a case of a class which it surely does not embrace, but to which its reason or scope should have made the law-giver extend it; or he withholds it from a case of a class which it embraces indisputably, but which its reason or scope should have made the law-giver exclude from it. Now, according to a notion or phrase which is current with writers on law, the Judge who thus enlarges or thus reduces the statute, 'interprets the statute by its reason' or his extension or restriction of the defective or excessive statute is 'extensive or restrictive interpretation ex ratione legis.'"

Regulation. The Courts are not at liberty to add this Regulation to Section 200 because the Section appears to be defective. The order of the Judge is expressly made under the Regulation; and the Collector has no option but to obey it, if it is valid; nor has the Government the power, which it has under Section 92, of prohibiting the appointment.

We think the order should be annulled as having been made without jurisdiction. We make no order as to costs.

The 19th May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Auction-sale—Bidder and Purchaser—Certificate of Sale—Second Sale—Act VIII of 1859 s. 254—Procedure.

Case No. 53 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 9th September 1872.

Huree Ram and Sree Ram (Decree-holders)
Appellants,

versus

Hur Pershad Singh (Opposite Party)
Respondent.

Baboo Ashootosh Dhur and Moonshee Mahomed Yusoof for Appellants.

No one for Respondent.

Held by Phear, J. (Ainslie, J., *dissentiente*) that, if for any good reason the auctioneer at an execution-sale, under the Code of Civil Procedure, does not accept as purchaser the person named by the highest bidder as his principal, he cannot make the bidder himself purchaser against his will: he must simply declare that no sale has been effected and reopen the bidding:

Held (similarly) that, where the Judge countersigned the certificate of sale in the following terms: "H P having made the purchase for Rs. 700 stated that he made the purchase for D K," he accepted D K as purchaser on H P's bid, and that when a second sale became necessary, the difference of price became recoverable from the apparent first purchaser under Act VIII of 1859 s. 254, and recourse should first have been had to D K who should have been allowed to show cause against an order of payment.

Ainslie, J.—On the 25th November 1870, certain property was put up to sale in execution of a decree obtained by the present appellants. The highest bid was Rs. 700 and was made by the respondent; and the property was knocked down to him at that price. On the conclusion of the sale he signed the sale-sheet as follows:—"Hur Pershad Mookhtar purchased for Mussamat Deoranee Kowar, &c."

The sale-sheet is then countersigned by the Judge in the following terms:—

"Lalla Hur Pershad Mookhtar having made the purchase for Rs. 700 stated that he had made the purchase for Mussamat Deoranee Kowar.

Ordered

That the *auction-purchaser* do at once pay the earnest-money into the Collector's treasury, and then put in the challan.

P. S. C. B."

Accordingly the earnest-money was paid in, but the balance of the purchase-money was not paid in as required by Section 254 of Act VIII of 1859, and the property was resold for Rs. 60.

The decree-holder subsequently applied to the Court under the Section referred to for the levy of the difference from the first purchaser.

The words of the Section are:—"If the proceeds of the sale which is eventually consummated be less than the price bid by such defaulting purchaser, the difference shall be leviable from him under the rules for enforcing the payment of money in satisfaction of a decree of Court."

The Judge's order on this application is as follows:—"This (*i.e.*, execution) must first be issued against the principal, and not against the Mookhtar who was merely his agent at the sale. The case is therefore struck off."

The decree-holder has appealed, urging that there is nothing to show that the respondent was acting under authority granted by Deoranee Kowar; that he did not disclose that he was acting for any one but himself till the sale was concluded, and that Deoranee Kowar is a person of no means.

It is clear that the respondent had no authority in writing from his alleged principal, and that he did not, while the bidding was going on, or until the lot was knocked down, intimate to the Judge that he was not bidding on his own account; and it is, I think, clear from the terms in which the Judge subscribed the sale-sheet that he

did not recognize Deoranee Kowar as the purchaser, although in accordance with a very common practice, adopted to prevent disputes under Section 260, he allowed the respondent to record that he had effected the purchase in the interest of Deoranee Kowar.

It seems to me that the Court would not have been justified in declaring on the bare allegation of Hur Pershad, unsupported by any voucher, that Deoranee Kowar was the person responsible for the payment of the purchase-money, and further that the Judge was bound to secure the interests of the judgment-creditor in the mode prescribed by the law by recording the name of the purchaser against whom proceedings could be taken, as in execution of a decree, in the event of a default in making good the full amount of the purchase-money.

Two courses were open to the Judge. One was to refuse Hur Pershad's bid and go on with the sale as if that bid had not been made, as soon as he found that he professed not to be acting on his own account and failed to show authority to act for Deoranee Kowar. The other was to hold Hur Pershad to be what at the time when the hammer fell he appeared to be, *viz.*, the actual purchaser. He elected the latter course, and I think he was quite right in doing so.

It appears to me that the concluding Clause of Section 254 creates a wide distinction between auction-sales held under the Act and common auction-sales in which the auctioneer is merely the servant or agent for the time being of the owner of the property to be sold, voluntarily selected by him. This Clause gives a summary remedy as by execution of a decree; and I think that this must be taken to be against a known person, and that it cannot be left to be determined afterwards who the real judgment-debtor is. The Judge has by his order thrown upon the free-holder the burden of proving by an informal sort of suit, analogous to nothing that I am acquainted with as a proceeding authorized by the Code of Civil Procedure, that some party other than the judgment-debtor on the record ought to be substituted for that judgment-debtor, not on the ground that such other party has succeeded to the place of the debtor since the making of the decree, but on the ground that the decree ought to have been made in the first instance against such party, and not against the debtor on the record.

It is not necessary to enquire whether Deoranee Kowar has means to make good

the difference between the prices bid at the first and second sales. It was not on her credit that the lot was knocked down. At that time neither the Court nor the judgment-creditor had reason to suppose that they were dealing with any one except Hur Pershad, and it seems to me that the creditor is entitled to recover from him in the mode prescribed by the law, and is not to be left to proceed first against Deoranee, and then, if those proceedings are ineffectual, by a regular suit against Hur Pershad for the unrealized balance.

The proceeding adopted by the Judge opens the door to endless fraud. Nothing would be easier than to put up the name of a mere dummy as the real purchaser and to prove with his (or as it generally would be, her) connivance that he was the real purchaser, so as to defeat entirely the provisions of Section 254. Of course, if the terms of the law are clear, the inconveniences arising from following them would be no argument for deviating from them; but if there is room for doubt, I think we are justified in looking to consequences in order to form a conclusion as to the intention of the Legislature. In this case, it seems to me that the letter of the law is consistent with what appears to be expedient.

I am of opinion that the order of the Judge ought to be set aside, and that we ought to direct him to allow execution to proceed against the respondent, this appeal being decreed with costs.

Phear, J.—I regret very much that I find myself unable to take precisely the same view as my learned brother of the merits of this case, and cannot concur in making the order which he proposes.

It appears to me that the Judge has in substance, though perhaps not in terms, dealt rightly with the matter of this appeal.

I need not repeat the facts which have been fully stated by Mr. Justice Ainslie. The execution-creditor applied for execution against the respondent under the terms of Section 254 of the Civil Procedure Code; and it is clear that he was only entitled to have his application granted if the respondent was the purchaser of the property at the first execution-sale. We have no other facts before us than those which are disclosed on the sale-sheet, and which have been mentioned by Mr. Justice Ainslie, and so far as these go it seems to me that the respondent was not the purchaser at the first sale, though no doubt a full enquiry into the matter might possibly show that he was.

The view which I take as to the process of an auction-sale may be shortly described as follows. All the terms of the contract, which is to be the contract of sale, excepting the price, are proposed by the vendor in the conditions of sale; and these are tacitly agreed to by every one who makes a bid.

The term as to price is negotiated (so to speak) and settled by the bidding, during which each bidder in succession offers on behalf of an intending purchaser a particular price.

That offer is *accepted* by the vendor which was highest at the moment when the auctioneer's hammer fell; and the person *on whose behalf* the bid was made thereupon became the purchaser on the contract of sale which is constituted of the conditions of sale and the accepted bid, unless, only, some valid reason exists why the auctioneer should not accept that person as purchaser, and does in fact refuse to do so.

The ordinary course is for the bidder to whose bid the property was knocked down immediately to announce the person on whose behalf the bid was made by him: if he does not expressly say that the bid was made for some person other than himself, it must be taken as against him that he did in fact bid on behalf of himself.

At this stage, it is the duty of the auctioneer to declare and to record in writing who was the purchaser, and Act VIII of 1859 evidently, as it seems to me, contemplates that he should do so. If for any good reason he does not accept as purchaser the person named by the highest bidder as his principal, he cannot make the bidder himself purchaser against his will; he must simply declare that no sale has been effected and reopen the bidding. I will here say that I think it would be good reason for not accepting the named principal that the bidder did not, when called upon to do so, produce a sufficient authority of agency from him.

In the case where the person named by the highest bidder is accepted as purchaser, the contract and parties to it are, I apprehend, in the same predicament as if all the terms including the price had, at the outset, been put into writing, and it had further been written down that the person who made the highest bid, effected that contract with the vendor for and as agent of the person whom he named as his principal, and not on behalf of himself. And on such a contract as this supposed, the person who acted as agent could not be treated as the principal contracting party,

merely because it in the end turned out that he had in fact no authority to bind his alleged principal, though no doubt he might on this ground be made responsible in damages.

In order to convert a person, who appears on a contract as agent, into principal, there must I think be dishonesty on his part in regard to his assumption of the character of agent: such, for instance, as would be the case if he really made the contract for himself though he pretended to be an agent only; or if he knew he had no authority to bind the alleged principal, and had no reason to expect that the contract would be ratified by him, and so on.

In the present case, it appears to me from the sale-sheet that Hur Pershad held himself out as agent only for one Mussamut Deoranee Kowar, and that the Judge accepted Mussamut Deoranee Kowar as purchaser on his bid. Had the Judge not done so, he would not have mentioned the Mussamut's name in the sale-sheet at all, and would have reopened the bidding. If it is said that the Judge conducting the sale wrote down Hur Pershad's statement that he had effected the purchase in the interest of the Mussamut, merely in order that by so doing he might prevent disputes under Section 260 of the Procedure Code, it seems to me that the whole point is conceded; for that Section enacts that—"The certificate shall state the name of the person who at the time of sale is declared to be actual purchaser, &c.;"—this must mean declared by the selling officer, and it accords with this view that in Section 253 it is enacted "the party who is declared to be the purchaser shall be required to deposit immediately" &c. With the greatest deference, then, to the views of my colleague I cannot avoid the conclusion on the facts before us that the Judge declared Massamut Deoranee Kowar to be the purchaser by agency of Hur Pershad.

On this state of facts, when it became necessary to have a second sale, and to put upon the purchaser at the first sale to make good the consequent difference of price under the terms of Section 254 of Act VIII of 1859, it seems to me that the Mussamut was the apparent first purchaser, and therefore the person to whom recourse should first have been had. She ought to have been called upon to show cause why an order for the payment of this difference should be made upon her. Then, in the event of showing good cause, or even without making any formal application against her if he had reason to be satisfied that she was not in

fact the purchaser, the judgment-creditor might proceed against Hur Pershad: but the proper mode of doing so would be, I think, by an order from the Judge calling upon him, on the foundation of the Mussamut's repudiation of the contract to show cause, why she should not be treated as principal party to it, and an order on him to pay the difference of price under Section 254. I may here remark that, in my opinion, process of execution could not in any case rightly issue against the defaulting purchaser for the difference of price which is leviable from him under the terms of Section 254, until an order for payment of that difference has been made upon him, and no such order could rightly be made upon him without affording him an opportunity of showing cause against it. For it seems to me that, until such an order for payment is made, there is nothing which can be executed, and it is only common justice that a man should be heard, or have an opportunity of being heard, before an order for payment of money should be made against him.

I confess I am unable to understand the apprehension of fraud which has been in some degree introduced as an element of consideration into this case. The selling officer must, I suppose, have this matter always pretty much under his own control; for he need never declare an absent person purchaser unless he is perfectly satisfied, at the time of sale, with the credentials which the agent produces. If he is not so satisfied, he may either give the bidder the option of being declared purchaser himself, or reopen the bidding.

On the facts which are before us, it seems me, after the best consideration which I give to them, though with the hesitation which the contrary opinion of Mr. Justice Ainslie necessarily inspires, that the Judge was right in refusing the judgment-creditor's application for execution against the respondent, and that consequently this appeal ought to be dismissed.

If the judgment-creditor on this application had satisfied the Judge that Mussamut Deoranee Kowar had repudiated the contract, then I think the right course would have been for the Judge to have called upon the respondent to show cause why he should not be treated as actual purchaser, and an order made upon him accordingly for the difference of price: and there is nothing in the dismissal of this appeal to prevent this course being taken.

The 19th May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Kubooleut—Registration.

Case No. 975 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 26th February 1872, affirming a decision of the Moonsiff of Persah, dated the 10th August 1871.

Sheo Ram Singh and others (Defendants)
Appellants,

versus

Sewak Ram (Plaintiff) *Respondent.*

Mr. M. L. Sandel for Appellants.

Mr. R. E. Twidale and *Baboo Kalee Kishen Sen* for Respondent.

An unregistered kubooleut is not inadmissible as evidence if it was executed at a time when the law did not require registration.

Phear, J.—In this case the plaintiff sues to eject the defendant from the occupation of certain lands of which he admits that the defendant has till lately been his tenant. The only substantial question between the parties is whether that has happened which enables the plaintiff to turn his tenant out of the land. Both parties agree that the occupation has been by virtue of some written agreements between the parties, and in particular a kubooleut was used in the first Court as evidence of the terms upon which the plaintiff leased the land to the defendant. The Lower Appellate Court has refused to look at that kubooleut upon the ground that it was not registered. It seems to us that in this particular the Lower Appellate Court was wrong, because, as the law stood at the time when the kubooleut was executed, it was a document which did not require registration.

Under these circumstances, it appears to us that the Lower Appellate Court has rejected evidence which it was very material to the interest of the parties on both sides that it should consider. Accordingly we reverse the decision of the Lower Appellate Court and send back the case for re-determination, with the direction that this kubooleut be admitted in evidence.

Costs will abide the event.

The 20th May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, J. B. Phear, C. Pontifex, and W. Ainslie, *Judges*.

Review—New Evidence—Special Appeal.

Case No. 957 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 1st April 1872, modifying a decision of the Moonsiff of that district, dated the 23rd January 1871.

Bhyrub Chunder Surmah Chowdhry and others (Plaintiffs) *Appellants*,

versus

Madhub Ram Surmah and others (Defendants) *Respondents*.

Baboo Mohinee Mohun Roy for Appellants.

Baboo Rajendro Nath Bose for Respondents.

An order granting a review of judgment on the ground that new evidence had been discovered, can be questioned in special appeal on the ground that there was no enquiry or proof that the new evidence was not within the knowledge of the applicant at the hearing, or could not be adduced by him before the decree was passed.

This case was referred to the Full Bench by Couch, C.J., and Glover, J., with the following remarks:—

Couch, C.J.—In this suit, the Subordinate Judge of Sylhet, on the 8th of January 1862, gave a decision in favor of the plaintiffs. The defendants, Madhub Chunder Surmah and Bhyrub Chunder Surmah, filed a petition for a review of the judgment with respect to plots 3 and 4 of the lands in suit, and a review of the judgment as to plot No. 4 was granted on the ground that new evidence had been discovered. The suit was then retried as to plot No. 4, and the result was that the suit was dismissed as to that plot with costs.

In this special appeal, it is objected that the Lower Appellate Court was wrong in allowing a review without enquiry or proof that the new evidence was not within the knowledge of the applicant for review at the hearing of the case, or could not be adduced by him when the decree was passed. It was admitted that no evidence of the statement in the petition for review was taken.

The question, therefore, arises whether the order of the Subordinate Judge granting the review is not final, and cannot be questioned in this special appeal.

The decisions in this Court are conflicting. On one side are X Weekly Reporter, 432; XVI Weekly Reporter, 7; and XVII Weekly Reporter, 458; on the other, III Weekly Reporter, Act X, 169; VII Weekly Reporter, 79.

The cases in VIII Weekly Reporter, 184, and IX Weekly Reporter, 181, may be considered to bear upon the question.

The cases in other Courts are I Madras H. C. R., 164; IV Madras H. C. R., 251; 4 Bombay H. C. R., 57.

The question referred is whether the order granting the review can be questioned in this appeal on the ground that there was no enquiry or proof that the new evidence was not within the knowledge of the applicant at the hearing, or could not be adduced by him before the decree was passed.

The Full Bench delivered the following judgments:—

Couch, C.J.—The question which has been referred to the Full Bench is whether the order of the Subordinate Judge granting the review is final, and cannot be questioned in the special appeal.

Now, in a special appeal, a decision passed in regular appeal may be questioned on the ground that there has been a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits. In this case, the Judge of the Lower Court allowed a review of a decision passed in regular appeal without any enquiry or proof that the new evidence was not within the knowledge of the applicant for the review at the hearing of the case, or could not be adduced by him when the decree was passed.

It was admitted that this was so.

Section 376 Act VIII of 1859 allows an application to be made for a review by any person who from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when the decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him.

In order that the Court may grant a review on the ground of the discovery of new matter or evidence, it must be such a case as is here described; and if a Court

grants a review without its being shown that the evidence was not within the knowledge of the applicant, or could not be adduced by him when the decree was passed, it is an error in the procedure;—it is granting a review when the law does not allow one to be granted,—granting it in a case which does not come within those specified in the Section which allows an application to be made for a review.

It is true that in Section 378, the words of Section 376 are not repeated. It is said generally—"If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application." And if the applicant does not show any such grounds as are described in Section 376, that is to say, if the application is not supported by proof that there are such grounds, it ought to be rejected. It would not be proper for the Court to receive an application on account of the discovery of new evidence without having some proof of the truth of the allegation. In another part of Section 378 it is said that "if it (the Court) shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review." But I do not think that this part of the Section is applicable to the present case, because the application for a review was upon the specific ground of discovery of new evidence. It appears to me that the act of the Lower Court in granting the review, as it did, without any evidence of the fact which was necessary to make the granting it allowable, was an error of law in the procedure which is a ground of appeal when the decision upon the review is brought before this Court in special appeal.

Then what is the effect of Section 378? It says that the order of the Court granting the review or rejecting the application shall be final. Is that to be read as controlling the right of special appeal to the extent that when the decision upon the review is brought before the Court, it is not to take notice of the error in law in the procedure by granting the review and rehearing the case. It appears to me that, taking the Sections together, we ought not to give such an effect as that to the word "final." It means there, as it does in some other parts of Act VIII., for instance in Section 257, that the order for rejecting the application or granting the review shall not by itself be open to appeal. A person shall not be at liberty to go to the Appellate Court and contend that the Court which has refused or

has granted a review ought not to have done so. But the word is not to be so construed that when the decree in the suit has been made, the legality of the order granting the review shall not be in any way questioned; that although the review may have been illegally granted, no question about it shall be allowed to be raised, and a person who had a decree in his favor shall not be at liberty to show that he was illegally deprived of the benefit of it by the Court granting a review, where the law has not said that a review may be granted to a person who merely said that he had discovered fresh evidence, but did not bring himself within the provisions of the law which says that the discovery shall be of evidence "which was not within his knowledge, or could not be adduced by him at the time when the decree was passed."

I think that is the construction which we ought to put upon these words in Section 378, and that it is proper that the parties in a special appeal shall be at liberty to show that there has been an error or defect in the procedure by the granting of the review which has affected the decision of the case upon its merits, by producing a different decision from what has been before come to.

Jackson, J.—I am of the same opinion. In the state of the law before the Civil Procedure Code was enacted, it was not competent to the inferior Courts in Bengal to review their own judgments without the sanction of the Superior Courts. By Section 378 (Civil Procedure Code) all Civil Courts were empowered to review their judgments for any of the causes set forth in that Section, one of them being "the discovery of new matter" or evidence which was not within his (the applicant's) "knowledge, or could not be adduced by him at the time when the decree was passed against him." This seems to be a specific cause on which a party aggrieved by a decree is entitled to apply for a review of such decree.

I think that, in respect of that cause, the power of the Court to grant a review is specially limited by the words of that Section. Then Section 378 declares that the order of the Court whether granting or rejecting the review "shall be final." That seems to me to bring the order into the position of an interlocutory order within the meaning of Section 363, that is to say, that it is an order not of itself appealable, but which "may be set forth as a ground of objection in the memorandum of appeal," if in pursuance of the admission of a review of judgment a

decree be passed against the party against whom the review is granted.

I quite concur therefore in thinking that, although an order granting a review cannot be made the subject of appeal, standing alone, yet the Appellate Court can take notice of it in special appeal, and if the review was improperly granted can set aside the judgment passed in furtherance of such review.

Phear, J.—I concur generally in what has been said by the Chief Justice.

It has, on several former occasions, fallen to me to express my views on this matter of review under the Civil Procedure Code of this country, and those views are reported in more than one of the cases which have been referred to. I do not therefore think it necessary to add anything to what has already been stated very fully by the Chief Justice.

It seems to me that we ought to answer the question which has been referred to us in these words:—The order of the Subordinate Judge granting a review can be questioned in special appeal.

Pontifex, J.—I concur with the Chief Justice.

Ainslie, J.—I concur.

The 22nd May 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Fraudulent Decrees—Decrees against Shebait.

Case No. 117 of 1872.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Dacca, dated the 10th April 1872.

Golab Chand Baboo (Defendant) *Appellant,*

versus

Prosunno Coomaree Debba and another
(Plaintiffs) *Respondents.*

Mr. J. T. Woodroffe and Baboos Mohesh Chunder Chowdhry and Kalee Kishen Sen for Appellant.

The Advocate-General and Baboos Romesh Chunder Mitter and Doorga Mohun Doss for Respondents.

In a suit to nullify a decree which has been confirmed in appeal, the plaintiff is bound to prove that the decree itself was tainted with fraud and a mere

colorable proceeding, and not an adjudication in a real suit *bona fide* brought and really contested. Failing to establish this ground, the plaintiff must fail in his suit.

A decree honestly obtained against a person as shebait of an idol is binding upon his successor.

Markby, J.—THIS is a suit brought to have certain properties described as debuttur properties; and specified in the schedule attached to the plaint, released from an attachment made in execution of decrees which the plaint describes as fraudulent decrees, by setting aside those decrees as well as a summary order subsequently passed in what is called the execution department having reference to the execution thereof. The decrees are dated respectively the 27th February 1852 and the 25th July 1854; and the summary order is dated the 29th June 1871. Now the substance of the case, as stated in the plaint, is that certain properties were granted in debuttur for the worship of an idol called Sree Sree Issur Luckhee Narain Thakoor; that the first shebait was one Bheekun Lall Thakoor, the second shebait was Gopal Pershad Baboo, and the third shebait was a person named Kisto Pershad Surmah, but always called Rajah Baboo. The plaint then states that Rajah Baboo was an extravagant and licentious person, and wasted the property; that the defendant, "on the fraudulent allegation of there being necessary acts connected with the worship of the idol, caused certain bonds to be executed by the said Rajah Baboo on false pretences, and having lent to him certain sums of money assisted him in his acts of extravagance; that at last on account of those debts he, the defendant, improperly obtained two decrees "on the aforesaid dates with directions that the decretal money shall be realized from the said debuttur properties." It is then stated that the properties were attached and put into the hands of a manager under those decrees; that afterwards the plaintiffs were appointed shebait in succession to Rajah Baboo on the 20th January 1868; that although they put forward a claim for the release of the debuttur properties, yet that claim was unsuccessful; and that they therefore brought this suit. The written statement on behalf of the defendant Golab Chand Baboo first raises an objection that the suit is barred under the provisions of Section 2 of the Code of Civil Procedure by reason of the decrees which we have mentioned. Then he complains that the plaintiffs, although they have held the office of shebait for more than three years, have done nothing towards getting rid of those decrees; that a

regular civil suit to set aside the summary order cannot be maintained; that the suit is barred by limitation; that the properties are not really debuttur properties. And then again, in the last ground, he contends generally that the matter now sought to be raised has been finally decided in his favor by those former decrees.

Now, before going to the judgment of the Court, we will state shortly what the two previous suits were, and what were the judgments passed in them. The first (in page 22 of the paper-book) was a suit brought by Golab Chand Baboo, who is the defendant in this suit, against Rajah Baboo, who is described as an inhabitant of Luckhee Bazar, and Jotton Coomaree Debee, mother and guardian of Goburdhun Baboo, a minor, and several other persons. We have not before us the record of that suit in the first Court; but only the judgment of the Appellate Court, which however sets out pretty fully what the nature of the case was. It appears that the suit was brought upon what is called a rahinnamah, or deed of mortgage, and a tamooook, on the allegation that a loan of Rs. 4,000 was taken for the purpose of repairing the dalan, &c., of the idol Luckhee Narain. The defence set up was in the first place that the money had been repaid. But it was stated that the main dispute between the parties was whether the money could be recovered from the property pledged or not. Now the question as to whether the money had been paid or not was fully decided by the Principal Sudder Ameen in favor of the plaintiff; but when he came to decide the other question as to whether the money could be recovered from the property mortgaged or not, he said that this point could be settled in the execution department. The plaintiff Golab Chand, who is now defendant in the present suit, was naturally dissatisfied with that decision, and preferred an appeal to the Judge complaining that the decision of the Principal Sudder Ameen had left the main question between the parties undetermined. He stated very properly that the points to be decided were whether his allegation that the money was borrowed for the purpose of repairing the dalan of the idol was true; and if that was true, whether he was entitled to recover the money from the debuttur property. In the appeal the respondent joined issue upon these two questions which were raised in various forms in the issues drawn up by the Appellate Court. Then the effect of the judgment of the Court is this:—The

Judge points out that Rs. 4,000 was borrowed upon a rahinnamah and also upon a bond, and that both the documents state that the money was borrowed for purposes connected with the temple. The Judge then, having taken the opinion of the Pundit of the Court, comes to the conclusion that inasmuch as there was no provision made in the grant of the debuttur land authorizing the sale or mortgage thereof, the rahinnamah could not be supported. The Judge then goes on to say with regard to the bond that it has been proved that the money borrowed was expended for the purposes therein stated, that is to say, for the purposes of repairing the dalan of the idol; and that, notwithstanding the objection of the then defendant Rajah Baboo and the other objectors that the property cannot be pledged for a debt, and therefore its produce cannot be attached on account of a debt contracted by the shebait, the debuttur property is liable for that bond-debt; and the Judge gives a decree directing that the money should be realized from the proceeds of the debuttur land.

The second suit was brought by the same Golab Chand Baboo, the present defendant, against Krishno Pershad Surmah *alias* Rajah Baboo whom he described as shebait of the idol Luckhee Narain Thakoor. We have a full abstract of the plaint which shows that the plaintiff in that case alleged that the money was borrowed by the then defendant, Rajah Baboo, as shebait of the idol for the purpose of certain ceremonies connected with the worship of the idol, and for carrying on the necessary expenses of a certain litigation which was then going on in Court; and he prayed that the amount of claim with interest thereon be awarded to him from the debuttur property. The substance of the answer is that the defendant had not taken the money for the purposes of the idol worship or for the costs of the litigation; that there was ample money out of the income of the idol to pay for the daily worship and other festivals, and also for all other purposes connected with the temple; and that the real truth was that the defendant had certain private transactions with the plaintiff for which the money was received. Issues were raised with reference to the allegations on both sides, and the Judge found that the money was borrowed by the defendant to defray the costs of the suit of debuttur, &c., and it was declared that, if the defendant failed to pay the amount personally, it should be realized from the proceeds of the debuttur mahal.

Nothing certainly upon the face of it can be clearer than those proceedings are that the very point which is now raised in this case was raised by Rajah Baboo himself in both the former suits, and also in the first suit by persons who, as far as we know, were quite independent of Rajah Baboo. Now we find it a little difficult to understand how the Subordinate Judge has dealt with these decrees. He says, and perhaps says rightly, that inasmuch as there is at any rate an allegation in the plaint that the decrees are fraudulent, the suit cannot be treated as barred by Section 2 Act VIII of 1859. But of course it was obviously necessary for him to go on and determine whether or not they were fraudulent, and we are not certain whether he means to say that there was any fraud in the mode in which those decrees were obtained, or whether he assumes that that was so because in his opinion the transactions which led up to them were fraudulent. The appellant in drawing his petition of appeal, however, seems to presume that the question of fraud in obtaining the decrees has not been disposed of by the Subordinate Judge. In his fourth ground of appeal he says that, in order to nullify these decrees, the plaintiffs were bound to prove that those decrees themselves were tainted with fraud, and were mere colorable proceedings and not adjudications in real suits *bonâ fide* brought and really contested. Now that is by no means the only question in this case disposed of by the Subordinate Judge and raised for our consideration in this appeal. One question, which the appellant was desirous to contend, was whether or not these lands were debuttur; and there were also other questions which would have to be considered, were it necessary to go into the whole appeal. But we were of opinion that the fourth ground of appeal was well founded in law, and if it could not be displaced, it would be a complete answer to the whole suit. We therefore thought that it was a convenient course to call upon the other side to support the judgment of the Subordinate Judge upon that point. In doing so, Baboo Romesh Chunder Mitter, who argued the case in the first instance on behalf of the respondent, raised three very clear contentions. He contended in the first place, and no doubt he had a right to contend that, that the Subordinate Judge had found, and the evidence established, that those decrees were fraudulently obtained; secondly, he argued that the decrees were not in such a form as to be binding on any person but Rajah Baboo

himself; and thirdly, that independently of any question of form, a decree against a shewait could be no more than *primâ facie* evidence against his successor.

Now, with regard to the question of fraud, it would of course be a great help to us to have a clear finding by the Subordinate Judge upon that point. The real question, however, which we have to consider is as to whether or no the evidence supports that allegation. We think that the substance of the evidence has been very fairly stated by Baboo Romesh Chunder. He says that what it goes to establish is, that there was a large income from the debuttur properties; that Rajah Baboo was addicted to licentious habits; that there was sufficient income of the properties to defray the expenses of the daily worship and other festivals of the idol; that Golab Chaud Baboo was Rajah Baboo's manager, and encouraged him in his licentious habits; and that there were two servants called as witnesses, one of whom proved that at any rate in the former of the two suits Rajah Baboo was not acting *bonâ fide*. That is what it is stated that the evidence amounts to. Now it may be that all this evidence is to some extent pertinent to the question which we have to consider, namely, whether those decrees were fraudulently obtained; but it is also perfectly plain that all this evidence, except that of the two witnesses referred to, only bears indirectly upon this question, and that it is in a great measure answered by the decrees themselves, because it might have been brought before the Court when the liability of the debuttur property was enquired into, and in fact a considerable portion of it was before the Court in one or other of those cases. The only direct evidence as to the mode in which the decrees were obtained is the evidence in pages 59 and 61 of the paper-book. It is extremely meagre, and what it seems to amount to is this, that Rajah Baboo had applied for a review of the judgment passed by the Appellate Court in the first suit; and that he was induced to abandon that application by receiving Rs. 300 from the present defendant. Now, in the first place, this evidence does not appear to have been accepted by the Subordinate Judge. On the contrary, we gather from his judgment that his view was that no application for review was filed, and certainly it has not been shown to us by any positive evidence that any such application was made. The view which the Subordinate Judge has taken is that it was suspicious on

the part of Rajah Baboo not to file a special appeal against the decision of Mr. Trotter. It seems to us that we ought not to set aside a decree upon such very meagre evidence as that, given so long after the decree was passed; and we feel bound to say that even if the Subordinate Judge did think the decrees were fraudulently obtained, that we find no sufficient evidence on the record to justify him in coming to that conclusion. We think, therefore, that upon that question we ought to hold that the decrees were obtained *bonâ fide*, that the parties were really at arms-length, and that Rajah Baboo was doing his best to get those suits dismissed. Throughout this case, we have not heard a single word that could suggest that the other persons who were defendants in the first case had been implicated in any fraud with Rajah Baboo, and there is no direct evidence whatever of any fraud in connection with the second decree.

Then we pass on to the next point. It has been argued (and this objection will only apply to the first of those cases) that Rajah Baboo had not been, as far as we have any evidence before us, described in the plaint as shebait of the idol, and that therefore that decree is not binding upon the shebait's successors. But it is perfectly clear from the abstract of the claim given in the decree that Rajah Baboo was sought to be made liable as the shebait of the idol, and it is also clear from the abstract of the answer that he had defended that suit as shebait. No doubt as a matter of form he ought to have been described in the plaint as shebait; but we do not think that that alone would be sufficient ground for saying that the decree is not binding upon any person except Rajah Baboo himself.

The last point is that which has been most strongly argued, namely, whether or not the decree against a person as shebait of the idol is binding on his successor. Now upon that point we have the authority of a Division Bench of this Court; and it has not been attempted by either of the Counsel for the respondent to distinguish the case which is reported in Marshall's Reports, page 485, or the case in the Select Reports on which that case was founded, and which was also cited by Mr. Woodroffe. Those cases establish that a decree obtained honestly against a shebait is binding on his successor, and we see no reason to doubt the correctness of those decisions. A great deal of argument has been imported in this

matter as to whether a shebait could alienate debatur property, or how far he would be barred by limitation, or whether an arrangement made by a person in charge of such property in reference to the property would be binding on his successor. All that, as it appears to us, has nothing to do with the present case. The question which we have now to consider is whether the decrees which were obtained against Rajah Baboo are binding upon the present plaintiffs; and in deciding that point, we have no hesitation in following the decision of Mr. Justice Norman and Mr. Justice Kemp in Marshall's Reports, unless there is any superior authority to the contrary. But the decisions of the Privy Council which have been referred to do not appear to us to have any bearing upon that question. The decision in II Moore, page 392,* was actually before Mr. Justice Norman when he delivered his judgment, and what the question there was appears in page 421, namely, whether a Mutwally has a right to alienate or transfer wukf property by gift, or otherwise. And no doubt this case is an authority that he cannot do so; but it has nothing to do with the question which we have to consider. Then with regard to the case in X Moore, page 454, if the circumstances of that case are looked at, it is plain that it has no bearing upon this case. What is binding is a decree of Court properly obtained, and not a mere agreement which the parties have entered into for their own purposes and embodied in a decree drawn up by consent. In that case what happened was that a previous arrangement having been made between the parties for their own purposes the suit was commenced on one day, and on the following day a compromise was made and a decree given, and Lord Chelmsford in dealing with it says:—"You get a cognovit for Rs. 54,000 on an advance of Rs. 26,986 borrowed according to your argument to save the estate, but under that cognovit, or confession of judgment, you force a sale yourself and actually buy in the minor's estate. Can that stand?" The use of the word "cognovit" shows how the Privy Council looked at it; and of course that is not an instance of a decree for the purposes of the question which we are now considering. The only other case quoted is in XIII Moore, page 270.† There is nothing in that case very precisely bearing upon the present question. We think, however, that

* 6 W. R., P. C., 3.

† 13 W. R., P. C., 18.

it is quite enough to cite one passage in it. The Privy Council say in giving judgment that "if the decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings, and especially on the judgments, be viewed as *res judicata* binding on the parties and those claiming under them." It seems to us that the Privy Council would never have used that language had they intended to intimate an opinion adverse to the opinion expressed by Mr. Justice Norman and Mr. Justice Kemp in the case we have referred to.

This being the view that we take of the case, all the other questions which have been taken in this appeal, and which were raised in the Court below, are questions upon which we need not express any opinion whatever. We confine our judgment entirely to the objection taken in the fourth ground of appeal, and hold that the decrees which the plaintiffs seek to set aside were fairly and honestly obtained as far as appears on the evidence before us, and that therefore they are binding upon the parties, and that the proceedings taken with reference to those decrees are also binding upon them.

There were two other questions raised by the Advocate-General in this case. One was that the order for attachment and appointment of a manager which had been made in execution of those decrees was not authorized by Act VIII of 1859. But no such point was raised in the Court below, or in this Court by cross-appeal, and we think it is sufficient to say that nothing has been shown to us upon which we can say that there was anything wrong in the proceedings that have been taken. The other point was that there ought to be an enquiry now to ascertain whether the amount covered by those decrees has been realized from the profits of the property through the manager. We think it is unnecessary to consider this point. It is quite sufficient to say that no such prayer has been inserted in the plaint. If the plaintiffs wish to have an enquiry made upon this point, it must be in a proceeding properly framed for that purpose.

The result is that the decree of the Lower Court ought to be reversed, and the plaintiff's suit dismissed. The appellant is entitled to his costs both in this Court and in the Lower Court.

The 23rd May 1873.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Appeal—Attachment—Act VIII of 1859 s. 246—Act X of 1859 s. 106.

In the matter of
Urjoon Sahoy, *Petitioner,*

versus

Rajah Nil Monee Singh Deo, *Opposite Party.*

Mr. C. Gregory for Petitioner.

Mr. R. T. Allan and *Baboos Oopendro Chunder Bose* and *Bhowanee Churn Dutt* for Opposite Party.

Where land is attached in execution of a rent-decree, and on an application either under Act VIII of 1859 s. 246 or under Act X of 1859 s. 106, it is released from attachment by order of a Court of competent jurisdiction, such order is not subject to appeal, and can only be impugned by a regular suit.

Glover, J.—We think this rule must be made absolute.

The petitioner Urjoon Sahoy obtained possession of the land in suit which he had bought in execution of a decree, and after he had been in possession for upwards of three years, the said land was attached by Rajah Nil Monee Singh in satisfaction of a rent decree obtained by him. Upon this, Urjoon Sahoy put in an objection, before the Assistant Commissioner under Section 246 of the Civil Procedure Code, but which in reality seems to have been made under Section 106 of Act X of 1859, and the Assistant Commissioner ordered the release of the property from attachment. Rajah Nil Monee Singh thereupon appealed to the Judicial Commissioner, who reversed the order of the Assistant Commissioner.

Now, whether the application of Urjoon Sahoy was made under Section 246 or Section 106, it is quite clear that the officer who passed the order releasing the property from attachment had complete jurisdiction to make it and his order was final, and not subject to appeal. The only way in which that decision could have been impugned was by a regular suit. There is no contention before us as to the illegality of the Judicial Commissioner's order admitting the appeal. It is not argued that he had any such power, and we must therefore say that the Judicial Commissioner's order being without jurisdiction must be quashed.

But it is said that we ought to go further than this and see whether the Assistant Commissioner's order was legal, as he had not followed the procedure laid down in Section 106. There is no proof on the record that the procedure under that Section had not been followed by the Assistant Commissioner. No contention was raised in the first Court that the transfer had not been registered, and there is no ground for supposing that the Assistant Commissioner did pass an improper order. But supposing that he did so, and that what he did was wrong in law, he still had jurisdiction to pass the order, and having jurisdiction this Court could not interfere with his order under Section 15 of the Charter.

The rule is made absolute with costs, two gold mohurs.

Mitter, J.—I concur in making this rule absolute.

The 23rd May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Rent-Suit—Execution-Proceedings—Appeal—
Act III of 1870—Act XXIII of 1861, s. 11.*

Case No. 45 of 1873.

*Miscellaneous Appeal from an order passed
by the Judge of Tirhoot, dated the 29th
November 1872, reversing a decision of
the Moonsiff of Tajpore, dated the 17th
June 1872.*

See Singh (Judgment-debtor) Appellant,

versus

*Peareeoonnissa and others (Decree-holders)
Respondents.*

Baboo Kalee Kishen Sen for Appellant.

*Baboo Bama Churn Banerjee for
Respondents.*

Where a decree by a Deputy Collector had been transferred to the Civil Court, and application for execution was made while Act III of 1870 was in force:

HELD, that the execution-proceedings were subject to the provisions of the Civil Procedure Code, and an order passed therein was appealable under Act XXIII of 1861 s. 11.

Phear, J.—It seems to us very clear that there is an appeal in this case. The decree was obtained, no doubt, originally in the Court of the Deputy Collector; but it was transferred to the Civil Court, and at the time when the present application was made, Act III of 1870 was in force. The third Section of that Act says that all decrees in partially entertained suits which were transferred, as this case was in fact transferred, were to be treated in all respects as decrees in suits brought under Act VIII of 1869, B.C. Then we have the Section 34 of Act VIII of 1869 enacting that, for all suits under that Act, the procedure should be that which is laid by Act VIII of 1859 and all subsequent Acts, in force governing the Civil Procedure of the country. It seems to us, therefore, very plain that, at the time when this application was made, this suit and the execution-proceedings in it were subject to the provisions of Act VIII of 1859 and all other operative Civil Procedure enactments, including of course the enactment of Section 11 Act XXIII of 1861. And by that Section an appeal is expressly given against an order made in the execution-proceedings such as this was. Accordingly we think that the Judge was wrong in the view taken by him to the effect that he had no jurisdiction to entertain the appeal. In due course then we might reverse this decision, and send this case back for retrial; but it seems to be very plain upon the record that it would be useless to send this case back for that purpose, because the application for execution of this decree was made beyond a period of three years from the date when the decree was made. There is no sort of question that, under Act X of 1859 and under Act VIII of 1869, B.C., alike, a decree made in the terms of this decree and for the amount of this decree must be executed within three years from the time when the decree was passed or not at all. We reverse the decision of both the Courts, and dismiss the application for execution with costs in all the Courts.

The 23rd May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Conjugal Rights — Injunction as to Return of
Wife.*

Case No. 1268 of 1872.

*Special Appeal from a decision passed by
the Judge of Shahabad, dated the 30th
May 1872, affirming a decision of the
Moonsiff of Arrah, dated the 28th March
1872.*

Lall Nath Misser (one of the Defendants)
Appellant,
versus

Sheoburn Pandey (Plaintiff) *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

*Mr. R. E. Twidale and Baboo Tarucknath
Dutt for Respondent.*

A suit for the return of plaintiff's minor wife and certain jewellery from the illegal possession or keeping of defendant having been decreed and the decree upheld in appeal, it was

Held, that the Lower Appellate Court had no authority to order defendant to send back plaintiff's minor wife and jewels; its utmost power being to enjoin him to abstain from putting any obstruction in the way of the wife returning to her husband.

Phear, J.—It seems to be clear that the Courts below have made a mistake in this matter. There was no authority in the Lower Appellate Court to order the appellant to send back the plaintiff's minor wife and her jewels. The utmost that the Court could rightly do, if there was an occasion for an order of the kind, was to enjoin the appellant to abstain from putting any obstruction in the way of the wife returning to her husband. The order which has been made is altogether different from that. In this case, such an injunction could hardly issue without an order upon the wife to return to her husband, and it does not seem to us that a distinct and intelligible order for the restitution of conjugal rights, or anything equivalent to it, was made upon the girl. Probably she is far too young for a Court of Justice to make such an order as that upon her. But whether she is so or not, for the reasons we have mentioned, it seems to us that it was a mistake to make the order against the appellant in the form in which it has been made. We have been

asked to modify the decree and to put it into the shape which we have spoken of as being the only shape in which the order could properly be made. We do not, however, see any reason upon the facts found by the Lower Courts which would lead us to make even an order of that kind.

Then as to the order to return the jewels, it is manifest from the finding of the Courts themselves that the jewels were a gift from the plaintiff to the wife. The plaintiff cannot get them back again as his property. Yet on that finding the Courts have given a decree against the appellant for the return of the jewels as if he was detaining the plaintiff's property.

It is difficult perhaps for us here to satisfy ourselves precisely as to the true relation between the parties, but it is at any rate quite clear to us that the Court cannot at one breath say that the jewels have been given by the plaintiff to the wife, and also order the appellant to deliver them back to the plaintiff.

On the whole, we think, that the order passed by the Lower Courts was wrong, and it must therefore be reversed with costs in all the Courts.

The 23rd May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Mahomedan Law—Dower—Mortgage—Lien.

Case No. 1113 of 1872.

*Special Appeal from a decision passed by
the Officiating Judge of Gya, dated the
27th March 1872, reversing a decision of
the Subordinate Judge of that district
dated the 29th July 1871.*

Mussamut Begum and others (Defendants)
Appellants,

versus

Doollee Chund and others (Plaintiffs)
Respondents.

*Messrs. R. E. Twidale and C. Gregory and
Moonshee Mahomed Yusqof for Appel-
lants.*

*Baboos Kalee Mohun Doss and Nullit
Chunder Sen for Respondents.*

A Mahomedan dying, his son N, who was in possession of the whole of the deceased's property, mortgaged it to

secure repayment of money advanced to him by the mortgagee. In the following year the three widows of the deceased brought a suit against N to assert their right of dower, obtained a decree, and in execution attached and sold the property, and buying it themselves got into possession. The mortgagee then brought a suit to obtain from the widows the property which he had purchased:

Held that until the widows brought their suit, the property in N's hands was not subject to a lien or charge in favor of them, and that it passed free from encumbrances to the mortgagee as a *bonâ fide* purchaser for valuable consideration.

Held that plaintiff was entitled to so much of the property as was N's share.

Phear, J.—This seems to be an extremely plain case. One Khorshed Ali, a Mahomedan gentleman, died in October 1865, leaving Nujimooddeen his son and three widows, as his heir and heiresses. The three widows also had a right to dower.

In June 1866, the son Nujimooddeen being in possession, as we understand, substantially of the whole of the deceased's property, mortgages it under the designation, which we have heard much discussed, of his milkeut mukururee,—8 annas share of certain property to secure the repayment of a sum of money which had been advanced to him by the mortgagee. At that time the widows

not made a specific claim upon Nujimooddeen for their dower. But in the following year, namely, in 1866, they brought suit against him to assert their right of dower, and they succeeded in getting a decree against him in that suit in June 1867.

It appears to us that it is now settled by several decisions that the Mahomedan widow's right to dower against the estate of her deceased husband is, generally speaking, simply in the situation of a debt which she, like any other creditor, can take legal measures to enforce against such property of her husband as she can find in the hands of the heirs, or even in the hands of any other persons, provided these have taken as volunteers or with notice of her making a specific claim against that property. No doubt, if she is herself in possession of the property, she is entitled to assert a lien upon it in respect of her own debt against the other heirs, and to pay herself her own debt before she pays the debt of any one else. But if she is not in possession of the property, and if she is forced to take proceedings in order to liquidate the debt out of her husband's property, she is, until those proceedings have ripened into some act of Court against the property, simply in the position of an ordinary creditor.

Thus it seems to us that, in this case, until the widows brought their suit in 1866, the

deceased person's property in the hands of Nujimooddeen was not subject to a lien or charge in favour of the three widows. Therefore, when Nujimooddeen pledged the property in June 1866 so far as his own share as heir in the property, was concerned, he was able to pass it free from all incumbrances to a *bonâ fide* purchaser for valuable consideration. It may be the money for which an heir under such circumstances as these aliens his share is taken for the purpose of discharging his ancestor's debt, and we do not think that the purchaser is bound to see to the application. It is not contended here that the mortgagee, who took by the bond of June 1866, was not a *bonâ fide* purchaser, and did not give valuable consideration. He was therefore entitled, as we think without doubt, to the benefit of this mortgage to the full extent of Nujimooddeen's own share, notwithstanding the subsequent proceedings which were taken by the widows to assert their right for dower, and which culminated in a decree in their favor in June 1867. The mortgagee did take proceedings in 1867 to enforce and make good his charge upon the property upon the footing of this bond; a decree for sale was made; and under that decree of sale the present plaintiff, an entire stranger to all the before-mentioned proceedings, bought in August 1869.

The result of this purchase is, we think, that the present plaintiff became entitled by virtue of the title passed by the bond of June 1866 to as much of the property as Nujimooddeen himself as heir could pass, provided the terms of the bond extended to that length.

It seems, upon examining the bond, that the bond purports to cover 8 annas share of the property, that being the full amount of the property which belonged to the father. Of this, 7 annas fell to Nujimooddeen, the only son by right of inheritance, and thus we think for the foregoing reasons that the plaintiff obtained a good title to the 7 annas share. But in the meanwhile the widows who obtained the decree of June 1867 had also under that decree attached and sold the property, bought it themselves, and got into possession of it. Thus it has happened that the plaintiff has been driven to this suit in order to obtain from the widows the 7 annas share which, as it seems to us, he was entitled to claim by reason of being the purchaser at the sale effected on the footing of the bond of 1866. And to the extent of

that 7 annas share, we think that the defendants have shown no answer to this suit.

In substance the Lower Appellate Court has taken the view which we have endeavoured to express. Consequently, we think the appeal should be dismissed, though the decree if it is at present larger must be varied to the extent of being reduced to the 7 annas share only.

Each party to bear his own costs.

As to the other point, namely, the question as to the meaning of the words *milkeut mokururee*, we think that as they are used in the bond they are really pretty nearly equivalent to "all my right whether mokururee or proprietary right." And this view is countenanced by the fact that the mokururee pottah was handed over at the time of delivering the bond, and as we have already said, the decree will be for 7 annas of the property.

The 26th May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Possessory Suit—Pleadings—Rights—Declaratory Decree.

Case No. 1207 of 1872.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 28th June 1872, affirming a decision of the Sudder Moonsiff of that district, dated the 12th July 1871.

Dhunput Singh Bahadoor (Plaintiff)
Appellant,

versus

Narain Pershad Singh (Defendant)
Respondent.

Messrs. J. T. Woodroffe and R. T. Allan
and Baboo Rash Beharee Ghose for
Appellant.

Baboos Unnoda Pershad Banerjee and
Grija Sunkur Mojoomdar for Respondent.

In a suit to recover possession of certain land and to close a road which defendant was alleged to have opened through the land, defendant pleaded, *first*, that the land was his, and, *secondly*, that there was a road there, a way for the public which had existed from ancient times:

Held that either of these pleas if proved was an answer to the claim.

Quære.—Where a plaintiff asks for the establishment of two rights, and it appears that he is entitled to one of

them, would it be sufficient to give him a decree for that one and to insert in the decree a declaration which would bar his right to that which he had failed to establish?

Couch, C.J.—We think this appeal must be dismissed. The plaintiff alleged that the defendant built a bridge over the beel and opened a road through his land, and he sought to recover possession of the land and to close the road.

The defendant said that the land where the road was, was his. He also alleged that there was a road there, and he said in the 5th paragraph of his written statement that it was an ancient wide road for the passage of men and carriages, and that although the ferry to which it led had ceased to exist, the road still existed. His defence therefore was first that the land was his, but that whether it was his or not there was a road over it; and from the mode of describing it, we think it must be understood that he meant, not a mere private right of way for himself and the occupier of the land, but a way for the public.

The cases that have been quoted do not, we think, apply to this case. That in the XVI Weekly Reporter is the case of a plaintiff asking to have his right established, and it might be said that where a plaintiff does that, he must show distinctly what his right is. And where a plaintiff asks for the establishment of two rights, and it appears that he is only entitled to one of them, the other must in some way be relinquished or abandoned. The remarks of Mr. Justice Macpherson to that extent appear to us to be sound, and we are not indisposed to concur with them, but we are not certain that, if a case of that kind came before us, we should not consider it sufficient to insert in the decree a declaration which would bar the plaintiff's right to that which he had failed to establish, and should give him a decree for that which he had established. But it is not necessary to determine that now. That case, as we have said, does not apply to the case of a defendant who, whether he proves that the land is his own or that there is a road over it, shows an answer to the claim of the plaintiff to have possession of the land or to have the road closed. It is enough if he proves one or other of his defences. The issues were framed according to the defence set up, one of them being whether there was an old running path by the disputed place, by which we understand the Moonsiff to mean

such an old road as had been alleged in the written statement.

The other case, to which Mr. Woodroffe referred, in the III Bengal Law Reports, is, in our opinion, equally inapplicable to the present. That was a case where the plaintiff sought for a declaration of a right of way. It may well be that, where a plaintiff asks to have a right of way declared over a piece of land, he should be required to specify the direction and extent of the way. That is quite different from the case where the plaintiff is seeking to close up a way, and the defendant says you have no right to a decree because there is a right of way over the place.

In our opinion, the matter determined here was a question of fact, *viz.*, whether there was a road running over the spot which has been described in the judgment of the Moonsiff, which the plaintiff claimed to be his land, and to have the way over it stopped up. That has been distinctly found by the Lower Court, and nothing has been shown which at all amounts to an error in law or in the procedure in the manner in which the Courts have dealt with the case. We think there was no ground whatever for this special appeal, and that it must be dismissed with costs.

The 8th May 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Lawrence Peel.

Religious Endowment—Alienation by Widow—Mortgage—Foreclosure—Limitation—Documentary Evidence.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Maharanee Brojosoondery Debea

versus

Ranee Luchmee Koonwaree and others.

In November 1867, G, as shebaet of the idol Shyamsoonder Thakoor, commenced a suit against L K and others to recover a zemindary alleged to have been improperly sold by plaintiff's grandmother K, widow of B.

It appears that about 1799, the zemindary was sold for arrears of Government revenue, and the name of the purchaser was entered as Shyamsoonder Thakoor "by

the pen of R N." In 1802, B S conveyed the property (though it does not appear how he got it) to R N as the gomastah of the idol for full consideration which was provided by B, the shebaet. Later a deed was executed by R N conveying the property to the idol and the shebaet. Both the above deeds were registered. B then mortgaged the property to K L, who was subsequently paid off by B's widow K (who had been appointed by B manager and owner) with funds borrowed from W and J on mortgage of the property. W and J ultimately foreclosed, and were put in possession, 47 years before the commencement of the present suit.

Held that, as the idol was not set up for the benefit of public worship, no priests appointed or brahmins having a legal interest in the fund, the property was not an endowment by B for the benefit of the idol so as to be perpetual and inalienable.

Held that K, as widow, was entitled to alienate the property (as she did) for the purpose of paying off her husband's debts.

Held that the suit was barred by limitation.

The duty of observing the High Court Circular of 1867, regarding the reception of documentary evidence, enjoined.

This suit was commenced on the 11th November 1867. It was brought by Maharajah Govindnath Roy, who was the grandson and heir, through adoption, of Maharajah Ramnauth, *alias* Biswanath Roy.

The suit is against Ranee Luchmee Koonwaree and others. It was brought by the plaintiff as the shebaet of the idol Shyamsoonder Thakoor, to recover a certain zemindary in Zillah Rajshahye, which, he contends, was improperly assigned and sold by his grandmother Maharanee Kristomonee, the widow of Biswanath Roy.

The two important questions in this case are, first, whether the property was endowed for a religious purpose; and in the next place, whether the suit is barred by limitation.

With reference to the endowment, it appears that, on the 17th of Joistee 1206, about the year 1799, the zemindary was sold for arrears of Government revenue. It was purchased for Rs. 5,005, and the name of the purchaser was entered as Shyamsoonder Thakoor, that is the idol, "by the pen of Rughoonath Nundee." It does not appear who Rughoonath Nundee was, but he merely signed on behalf of the idol as the purchaser. Where the Rs. 5,005 came from does not very clearly appear; but there can be no doubt from the whole of the case that the money was supplied by the Maharajah Biswanath.

On the 18th August 1802 there was a bill of sale executed by Brojokishore Shaha, said to be a purchaser of the zemindary, in favor of Rughoonath Nundee, but how Brojokishore Shaha got the property does not appear. How the idol, who had purchased at the auction, transferred his property, or by whom the property was transferred on

* From the judgment of Norman and E. Jackson, JJ., in Regular Appeal No. 182 of 1868, decided 5th January 1869,—11 W. R., 13.

behalf of the idol, does not appear; but it appears that Brojokishore Shaha reconveyed or conveyed the property to Rughoonath Nundee as the gomastah. Rughoonath Nundee is described (I do not know whether it is very material) merely as the gomastah of the idol, whereas the Maharajah is described as shebaet. Whether there is any material distinction between a gomastah and a shebaet, I am not aware, nor is it, I think, very important. Now the bill of sale says:—"In the course of business by Brojokishore Shaha, son of" &c., "in favor of Rughoonath Nundee (gomastah of the most worshipful Shyamsunder, that is, the idol)." "Having failed to clear and prepare, and pay the Government revenue of our purchased zemindary Pergunnah Soojanuggur Sirkar Bhuggo Korat, within Chakla Bhadorea, the sudder land revenue of which said pergunnah, as per allotment, is recorded at Rs. 4,742 4 annas 14 gundas; and whereas there is no possibility of our doing so next year, we do of our own will and accord, in full possession of our reason and senses, in health of body, and without compulsion, sell to you," that is, to Rughoonath Nundee, "the pergunnah aforesaid, for a full consideration, of Rs. 5,901." Where that money came from does not appear, but there is no doubt that it was the money of the Maharajah. A certificate of that sale was put in evidence, which does not carry the case any further, and the deed was registered.

On the 24th of Choitro 1211, a deed was executed by Rughoonath Nundee, conveying the property to the idol and the Maharajah shebaet. He says:—"This deed of agreement is executed in the course of business. Being appointed in the office of gomastah,"—there he calls himself again "gomastah"—"on the part of the idol, I have purchased in the name of the god pergunnah Soojanuggur, from Tikhum Roy and Brojokishore. I having myself caused the bill of sale to be executed, my name is recorded in the bill of sale, certificate of sale, and bill of mutation of names as gomastah on the part of the god. And I now present the bill of sale, &c., under the hand of the Roy and Shaha before you, to enable you to present a petition to have the said pergunnah entered as a zemindary in the name of the god and your own name recorded as the shebaet thereof; and I accordingly agree and write this to the intent that you may have the names of the Roy and Shaha struck off from the Collectorate in respect of the said pergunnah, and have your own inserted in the office as a zemindary in

"the name of the god, and yourself as the shebaet thereof." That document was also registered, and therefore anybody could have discovered that the deed had been executed.

But the question is whether there is any evidence of an endowment properly so called. Now what is the evidence of an endowment? This was clearly not an endowment for the benefit of the public. The idol was not set up for the benefit of the public worship. There are no priests appointed, no Brahmins who have any legal interest whatever in the fund. It is not like a temple endowed for the support of Brahmins, for the purpose of performing religious service for the benefit of any Hindoo who might please to go th-re. It is simply an idol set up by the Maharajah, apparently in his own house, and for what purpose? Why, for his own worship. We constantly have suits claiming certain turns of worship, but here there is no turn or right of worship established. There is nothing stated in any way to show that the Maharajah intended that the idol should be kept up for the benefit of his heirs in perpetuity; and before it can be established that lands have been endowed in perpetuity, so that they can never be sold and must be tied up in perpetuity, some clear evidence of an endowment must be given. What are the objects of the endowment? None of the essentials of an endowment are stated. The Maharajah appears to have purchased the property in the name of the idol, and that is all. Then he deals with the funds of the idol as if it were his own property. There is no evidence at all of any of the essentials of an endowment in favor of the idol.

In the case of Mahatab Chund and another, in the 5th volume of the Sudder Dewanny Adawlut Reports, 268, which was a very similar case, it was held that when an endowment is merely nominal, and indications of personal appropriation and exercise of proprietary right are found, a sale of the property is valid under the Hindoo law.

It appears, therefore, to their Lordships, upon the authority of that case, and upon the principle of endowments, that this was not an endowment by the Maharajah in perpetuity for the benefit of the idol, so as to establish that the property so conveyed to the idol was to be the property of the idol for ever and that nobody could alienate it. Suppose the Maharajah had established the idol in his house, would anybody pretend that he could not sell his house? Well, then, what would become of the idol's temple in the house? He could sell the house, notwithstanding he

had put an idol there; and what would become of the idol itself? Here there was no endowment, no priest, no public, no one legally interested in the worship of this idol, except the Maharajah himself, and nothing to show that the Maharajah intended to establish it for the benefit of his sons or heirs, or anybody else, in perpetuity.

If there was not an endowment, the case appears to be very clear. The Maharajah having purchased the property in the name of the idol, mortgaged it to Komul Lochun Nundee for a sum of Rs. 32,000. Komul Lochun, not having been repaid, took steps to foreclose the estate, and the period of foreclosure was about to elapse when, the Rajah having died, and having appointed his widow, Kristomonee, the manager and owner of the property, she came in and made an arrangement with Komul Lochun to extend the period; and she afterwards borrowed from Rajahs Woodmunt Singh and Janokeram Singh Rs. 46,400, with which Komul Lochun was paid off. The conditional sale was to pay off a debt due from her husband to Komul Lochun. Now, as a widow, she was entitled to alienate the property for the purpose of paying and discharging her husband's debts. After that the period for the repayment of the money to Woodmunt Singh and Janokeram Singh having elapsed, they foreclosed the estate against the widow Kristomonee, and brought a suit and recovered possession of the land, and were put into possession 47 years before the commencement of this suit.

The defendants claim under Rajahs Woodmunt Singh and Janokeram Singh. Rajah Janokeram Singh died, leaving Rajah Woodmunt Singh his heir; and the whole property then became established in him. He died, leaving two sons, and the sons conveyed the property to the defendants. It is unnecessary, however, to enter into the title of the defendants.

The question is, has the plaintiff any right to recover this property? The widow made a valid sale of it; and, even without the statute of limitations, the defendants are entitled to it.

The Courts below have both held that there was no actual endowment. The Principal Sudder Ameen (although possibly all his reasons may not be correct) says:—"It is simply this, that the grandfather of the

"deceased purchased the property claimed in the name of the idol." Then he held that there was not an endowment, and that the property was the private property of the grandfather. The High Court say:—"No evidence has been given to show that there ever was any formal dedication of the property to the idol. It is a mere purchase in the name of the idol. From the time of the purchase of the property, Rajah Biswanath Roy appears to have dealt with it as his own."

In the case of *Gossain vs. Gossain*,* 6 Moore's Indian Appeals, it was held that if a Hindoo purchase property in the name of his son, the property is not vested in the son, but remains vested in the father who purchased; and so with regard to an idol. If a man merely purchases property in the name of his own idol, whom no one except himself has the power or right to worship, the property is not the property of the idol, but the property of the person who purchased it. The High Court say:—"From the time of the purchase of the property, Rajah Biswanath Roy appears to have dealt with it as his own. In 1802 it was conveyed or mortgaged to one Bheekum Roy, and in 1812 it was mortgaged apparently for the Rajah's purposes. There is no proof that either the first or the second mortgage was executed in any way for the purposes of the worship of the idol, or for the performance of any trust connected with it. For all that appears the money was raised for the private purposes of the Rajah. No evidence has been given to show that the revenue of the property was expended for the purposes of the idol, and the pleader for the appellant, when arguing the case before us, was not prepared to go into evidence upon that point. We do not mean to rest our decision of the case on that point. But we may observe that we do not see any reason to doubt the correctness of the decision of the Principal Sudder Ameen that there was no real endowment."

Now both the Courts below have found that there was no real endowment, and their Lordships entirely concur in that finding. There was, therefore, nothing to deprive the purchaser of the power of alienation.

It is scarcely necessary to advert to the question of limitation. In this case 47 years

* 4 W. R. P. C., 46.

have elapsed since those under whom the defendants claim purchased the property *bonâ fide*, under the belief that the foreclosure in favor of Rajahs Woodmunt Singh and Janokaram Singh was a valid title in those parties, and they purchased the property for a valuable consideration. The property has been out of the possession of the Maharajah's family for upwards of forty-seven years, and limitation is clearly a bar to the suit.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decision of the High Court with the costs of this appeal.

Their Lordships desire, in disposing of this appeal, to advert to the very large portion of the printed record which is occupied with unnecessary papers. From page 16 to page 360 the record consists of mere entries in books, the principal part of which have nothing at all to do with the case. A large expense must necessarily have been incurred in printing all that matter, not one item of which has been referred to in the argument before us. It was wholly unnecessary, and merely encumbered the case, encumbered the Court, and brought a heavy useless expense upon the parties.

A circular order was issued by the High Court in 1867,* before this suit was commenced, pointing out to the Judges of the subordinate Courts their duty in this matter. And I will read a portion of the order of the High Court, because it is essential, in their Lordships' opinion, that the subordinate Courts should act according to this rule, so that all such unnecessary expense may be saved to the parties. Speaking of the Code of Civil Procedure, the rule says:—"Section 132 repeats the direction contained in Section 39, that if the exhibit (or document) be an entry in any shop-book or other book, the party on whose behalf such book is produced shall produce a copy of the entry, which copy shall be endorsed as aforesaid and be filed as part of the record, and the book shall be returned to the party producing it; and the Court ought, doubtless, in these cases, as under Section 39, to mark the document, i.e., the entry in the book, for the purpose of identification, before returning it. It will be observed

that the words as to the return of the book are imperative, and that the party has not the option (as under Section 39) of delivering the book to be filed instead of the copy of the entry. From inattention to this rule it has been matter of frequent occurrence for great numbers of account and other books to be received and actually filed in the subordinate Courts, and to be afterwards sent up to the Appellate Courts, to the serious inconvenience of the Courts themselves, and probably of the parties, except in those cases where the books have been prepared *pro re natâ*, a thing which occasionally happens. But the inconvenience reaches a climax when the importance of the suit and the determination of the parties bring about an appeal to England. It then becomes *primâ facie* necessary to translate and to print the whole of the contents of these voluminous books and other papers, and the resulting costs are frequently enormous. This Court is occasionally, at very great trouble to itself and to the pleaders engaged, able to apply some check to the evil; but in many cases the check has not been applied, and in consequence the Lords of the Judicial Committee of the Privy Council have in several instances made complaints and observations upon the nature of the evidence sent home from this country. The answer of this Court on these occasions has been, that the evil is one with which the Appellate Courts can but imperfectly cope, and that the effectual remedy must be applied in the Courts of first instance. And it is very much with a view to obviate these particular complaints, and to remove this just reproach from the procedure of the Courts in India, that the present instructions are issued."

Those instructions were sent to all the subordinate Courts before this suit was commenced. Their Lordships think it will be highly beneficial if the High Court will take care that this Circular Order is enforced, and that similar unnecessary proceedings shall not continue to form part of the records transmitted to Her Majesty in Council.

* Circular Order No. 9, dated 26th February 1867,—7 W. R., Civil Cir., 4.

The 26th May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Tenants-at-will—Right to Rent—Transfer of Rights—Onus Probandi.

Case No. 1191 of 1872.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 22nd February 1872, affirming a decision of the Moonsiff of Ranaghat, dated the 3rd December 1871.

Gooroo Prosunno Banerjee (Plaintiff)
Appellant,

versus

Sreegopal Pal Chowdhry and others
(Defendants) *Respondents.*

Baboo Hem Chunder Banerjee for
Appellant.

Baboo Nullit Chunder Sen for Respondents.

Where a party occupies land within a zemindaree, with the zemindar's permission as a tenant-at-will, on the terms of paying rent, a purchaser of the zemindaree has a right to treat him as his tenant, unless the zemindar has transferred his right, *e.g.*, by granting of putnee for the land to a third party.

In a suit by such purchaser against such tenant in which the third party intervened, the issue whether the zemindar transferred his right to the plaintiff or had previously transferred them to the intervenor was material.

Couch, C.J.—THE case of the plaintiff appears to be that the defendants occupied

land in Ghole Nudia, which was part of the zemindaree of Mr. Mackintosh, as, what is called in the judgment of the Lower Court, an *ootbundee* tenure; and were tenants-at-will, and that the plaintiff purchased the zemindaree of Mr. Mackintosh, and consequently became entitled to receive the rent from the defendants from the time of his purchase.

The defendants appear not to have denied the occupation, but to have alleged that they occupied under some other tenure. And a third person intervened. His case was that the land which the original defendant occupied was indeed within the zemindaree of Mr. Mackintosh, but that he, the intervenor, had, before the purchase by the plaintiff, obtained a putnee of it, and therefore was entitled to receive the rent from the original defendant. As regards the intervenor, therefore, the question would be whether the land occupied by the original defendant was within the putnee granted to him or not. If not, it would pass by the purchase to the plaintiff.

That question appears to have been tried and determined by the first Court. When the suit came before the Judge on appeal, he appears to have thought that it was not material to consider that, and that the plaintiff could not recover the rent unless there was an agreement between him and the original defendant to pay rent. And considering, as he did, that there was no evidence of any such agreement, he dismissed the appeal, holding that the plaintiff was not entitled to recover at all, and that it was not necessary to consider the other question.

In this, we think, he was wrong. He is mistaken in supposing that there need be an express agreement between the parties to pay rent. If the original defendant was occupying as a tenant of Mr. Mackintosh, occupying with Mr. Mackintosh's permission as a tenant-at-will on the terms of paying rent, the plaintiff would have a right after his purchase to treat him as a tenant; and then the material question was, that, which was decided by the first Court, namely, whether Mr. Mackintosh transferred his right to the plaintiff, or had previously transferred them, through the putnee, to the intervenor. That question ought to have been determined. The Judge has not tried the case properly, and it must be remanded to the Lower Appellate Court to be retried. The costs will abide the result.

The 28th May 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Hindoo Law—Joint Property—Inquiry by Purchaser.

Case No. 157 of 1872.

Regular Appeal from a decision passed by the Second Subordinate Judge of the 24-Pergunnahs, dated the 17th May 1872.

Kylash Kaminee Dossee (Plaintiff) *Appellant*,

versus

Tarinee Churn Bose (one of the Defendants) *Respondent.*

Baboo Oopendro Chunder Bose for Appellant.

Mr. R. T. Allan for Respondent.

An intending purchaser of property which has been previously mortgaged, who has no reason to suppose it to be joint family property, or the vendor to be a member of a joint family, and who has enquired of and learnt from the mortgagee that there was no fraud, is not bound to make any further enquiry.

Couch, C.J.—THE plaintiff in this suit was the widow of Prosunno Coomar Biswas, and she claimed a share in various properties mentioned in the plaint which she said her husband was entitled to as a member of a joint Hindoo family, and to which she had succeeded upon his death. Only one of these properties is the subject of the present appeal, and we need only consider the case as it relates to that. It is called in the plaint No. 2, and the statement about it is that it was purchased in the name of Debee Pershad Biswas, the uncle of the plaintiff's husband, and had stood in his name, and was in his possession, but that it was the property of the family. It had been sold by Debee Pershad Bose, as the plaintiff says, alleging it to be his exclusive property, and it was sold to the second defendant Tarinee Churn Bose.

Tarinee Churn Bose, in his written statement, said, that it had been purchased by Debee Pershad Biswas from Gobind Mohun, and was his own property, and not family property; and that, in 1274, Debee Pershad sold it to him as his own property for a proper consideration. He also said that, even if the property No. 2 was really

joint property, Debee Pershad Biswas had sold it as head of the family, and that the plaintiff was bound by his act.

The Subordinate Judge, upon this part of the case, found that the property was family property. It is not necessary to notice his reasons for this finding, because no question as to its correctness is raised in this appeal. He then said:—"The defendant Tarinee Churn cannot claim protection on the ground of being a *bonâ fide* purchaser. The plaintiff, so early as 1866, declared the property to have been a portion of the joint estate in her petition for certificate under Act XXVII. That might be held as sufficient notice to the defendant that, in purchasing from one of the members, he was not making a *bonâ fide* purchase—I Weekly Reporter, page 316."

We doubt the correctness of what is here laid down. It is admitted by the plaintiff that this property was purchased by Debee Pershad Biswas and stood in his name, and he was the ostensible owner of it. The petition for the certificate under Act XXVII does not appear to have been known to Tarinee Churn Bose. It was not a proceeding which would be notice to all persons. The Judge appears to have considered that the fact of there being such a proceeding must be known to the purchaser. We do not think there is any authority for that.

He then said that the status of the family was a sufficient notice to the purchaser, for which he quotes the case in I Weekly Reporter. But it does not appear that Tarinee Churn Bose knew that Debee Pershad was a member of any family. For all that appears, he might have believed that he had no brothers, and that he was the sole member of the family. We do not think we can go so far as to say that where a person has dealings with a Hindoo, he must deem him to be a member of an existing family; that he is bound to consider that he must have other relations who would, with him, form a joint family. It may be that where the purchaser knows that the person with whom he is dealing has brothers, or other near relations, he would be bound to consider that they constituted a joint family (unless something was shown to the contrary) on account of the ordinary presumption of the Hindoo law. But that is certainly, as far as we ought to go, and there being in this case nothing to show that Tarinee Churn Bose was aware of Debee Pershad having relations, we cannot say that

he had notice that he was dealing with this property as a member of a joint family.

But it is not necessary to determine this question in order to dispose of the present appeal, for the Subordinate Judge, although he found that Tarinee Churn Bose could not claim protection on that ground, has held that the consideration-money for this purchase, the money which was paid by Tarinee Churn, was applied for the purposes of the joint estate; and if it was so applied, there is an answer to the plaintiff's claim. We think there was evidence upon which the Subordinate Judge might properly find that. There is the witness Indro Narnin Ghose who said, in the first instance, that Debee Pershad having to pay damages for which he had been sued by Nazeer Ali Khan in respect of the property of the family, mortgaged the garden for Rs. 2,000, and that, subsequently, the mortgage was paid off by the sale of the property to Tarinee Churn, and the balance was also applied in payment of expenses which would be payable out of the family funds. He said:—"The Shooroopara garden was mortgaged by Debee for the liquidation of the debt of Nazeer Ali, and for the expenses of the marriage of his own daughter. I had also endeavoured to cause the mortgage to be taken. Therefore I know it. Through Punchanun Bose, the mortgage was effected."

When we look at the evidence which was produced on the part of the purchaser, Tarinee Churn Bose, his conduct in the matter appears to have been quite *bonâ fide*. There is nothing to show that he had any information which would lead him to suppose that the sale to him was made by the manager for a joint family. First it is shown by one of his witnesses that the mortgage to Sagur Dutt was made for Rs. 2,000; and it appears that the general assistant of Sagur Dutt was engaged in the transaction, and that he was told that Debee Pershad had no other sharer in the property.

The purchase by Tarinee Churn appears to have been managed by his son who was called as a witness, and he said that he enquired of Sagur Dutt about the matter, and was told by him that there was no fraud. He said that he made no further enquiry about it. We cannot say that he was bound to make any further enquiry. He was purchasing a property which had been previously mortgaged. He had no reason to suppose, as we have already mentioned, that Debee Pershad was dealing with family property, or was a member of a joint family.

So far as appears upon the evidence, the conduct of the purchaser seems to have been fair and proper. There is no reason for supposing that there was any collusion between Sagur Dutt or Tarinee Churn and Debee Pershad, and as we have said there is the evidence of one of the witnesses believed by the Subordinate Judge that the money was applied for family purposes. We think that, with respect to the property No. 2, the plaintiff has shown no case entitling her to recover it from the purchaser. The appeal must be dismissed with costs.

The 28th May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,

Judges.

Review—Appeal—Limitation.

Case No. 1275 of 1872.

Special Appeal from a decision passed by the Judge of Gya, dated the 27th March 1872, affirming a decision of the Subordinate Judge of that district, dated the 17th August 1871.

Roop Kallee Kooer (one of the Defendants) *Appellant*,

versus

Doolar Pandey (Plaintiff) and others (Defendants) *Respondents*.

Moonshee Mahomed Yusoof and Baboo Boodh Sen Singh for Appellant.

Messrs. R. E. Twidale and C. Gregory and Baboo Sreenath Doss for Respondents.

Whether a review order is rightly made upon legal grounds or not, when once made it has the effect of reopening the hearing and of causing the judgment passed upon such hearing to be the final judgment as regards the parties to that review. Consequently any such party's right of appeal against the decretal order runs from the time of the final order on review, even if the Appellate Court should put aside the review matter.

Phear, J.—We are of opinion that the Judge of the Lower Appellate Court took quite the correct view with regard to the review order when he expressed his conclusion that it was made illegally, and could not therefore have the effect of introducing new matter of evidence into the case. But it

seems to us that the Judge entertained a slight misapprehension as to the effect of the review order in other respects. We think that whether the review order was rightly made upon legal grounds or not, when once made it had the effect of reopening the hearing of the case, and so to cause the judgment made upon the review hearing to be the final judgment so far as regards the parties to that review. Consequently the appellant in this instance had a right of appeal to the Judge against the final order which was made on review. Also the Judge was perfectly correct when, at the hearing of that appeal, he came to the conclusion that the review order ought never to have been made, and in that sense the review matter should be put on one side. Still, inasmuch as the judgment of the first Court on the review was the final order of the first Court in the case so far as the appellant was concerned, the appellant's right of appeal against the decretal order of the first Court ran from that time, and not from the date of the first decretal order which was reviewed; and therefore the Lower Appellate Court ought not to have stopped after disposing of the purely review matter: it ought to have gone on to entertain the appeal against the decretal order of the first Court on its merits. And we apprehend that the Judge would have found no difficulty whatever in this case, because he must have been called upon to deal with pretty substantially the same materials as those involved in the appeal which was brought against the order of the first Court by the other defendant.

We express no opinion whatever on the merits of the case. The two defendants had a right of appeal separately, and in fact they appealed, as under the circumstances of the case probably they must have appealed, separately. It has happened, by reason of the first Court entertaining the application for review and hearing the case on review, that the present appellant got a longer time for appeal than her co-defendant had.

We reverse the decision of the Judge, and send back the case for hearing upon the merits of the present appellant's appeal in the Court below.

Costs will abide the event.

Of course, the Judge on hearing the appeal on the merits will exclude any new matter, such as it was, which was introduced at the review, because, according to the opinion which he himself has expressed, it was wrongly admitted, inasmuch as the review ought never to have been entertained.

The 28th May 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Hindoo Law—Inheritance—Daughter—Alienation.

Case No. 1459 of 1872.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 21st July 1872, affirming a decision of the Moonsiff of Mozufferpore, dated the 31st January 1872.

Deo Pershad (Plaintiff) *Appellant,*

versus

Lujoo Roy (one of the Defendants)
Respondent.

Baboos Mohesh Chunder Chowdhry and Kalee Kishen Sen for Appellant.

Baboos Chunder Madhub Ghose, Aubinash Chunder Banerjee, and Hureehur Nath for Respondent.

Where the daughter takes her father's property on the death of the widow in default of a son, she takes the inheritance with a qualified power as regards alienation, in respect of which she is in no better situation than the widow. On the death of such daughter, the heir of her father succeeds as his heir, not as her heir.

Phear, J.—We think that this question upon which the Lower Appellate Court decided the case is concluded by authority adversely to the view which the Lower Appellate Court took of it.

It appears to us that there is no doubt now on this side of India that, in such a case as this, where the daughter takes her father's property upon the death of the widow in default of a son, she takes the inheritance with a qualified power as regards alienation. She is in respect of alienation in no better situation than the widow; and any alienation which may be made by her is liable to be called in question by the heir of her father who will take the inheritance in default of a valid alienation. It may be the state of the law in the Bombay Presidency (as in the case cited on the part of the respondent), here, we think, there is no doubt that on the death of the daughter who has taken the property as we have said, it is the heir of her father (the ancestor) who succeeds, and who takes it as the heir of the ancestor, not as her heir.

It is not necessary to enquire whether the plaintiff was in existence or not at the time when the alienation was effected, because we think that at no time during the daughter's life had she an absolute unqualified power of alienating the property. With these views we think that the decision of the Lower Appellate Court must be reversed, and the case sent back to that Court for retrial on the merits.

Costs will abide the event.

The 28th May 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Cause of Action—Joinder or Splitting of Causes.

Case No. 1209 of 1872.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 16th April 1872, affirming a decision of the Subordinate Judge of that district, dated the 10th March 1871.

Ram Soondur Shaha (Defendant) *Appellant*,

versus

J. P. Delanney (Plaintiff) *Respondent*.

Baboo Kalee Mohun Doss for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

The fact that a defendant's title rests upon different and distinct transactions, supported by distinct and separate evidence, does not necessarily imply that, to a party contesting that title, there are different causes of action warranting separate suits.

Couch, C.J.—It appears from the judgment of the Judge in the suit which is the subject of this appeal that it was argued before him that there were two other cases analogous to the present, one of which had been disposed of; that the cases ought to have been included in one suit as there was only one cause of action, and that the suit which is the subject of this appeal, and the suit called No. 34 which is the subject of another appeal, ought to have been rejected under Section 7 of Act VIII of 1859. The Judge states that against this objection it was contended that though the several *shikmee* settlements are comprised within the same talook, still they were made with three different parties, and are supported by distinct

and separate evidence; and he decided against the objection on the ground, as he says, that "although it is true that Ram Soondur, the defendant in the suit now before us, represents the original parties by purchase, but his title rested on three different distinct transactions, each established by separate and distinct evidence; and if the three suits had been brought in one, it would have been necessary to have treated them separately."

That mode of disposing of the objection is in our opinion wrong. The question was whether there was one cause of action, and it is not enough to say that the title of the defendant rested upon different and distinct transactions, and was supported by distinct and separate evidence. It does not appear in this judgment that the question raised before us was raised before the Judge. According to it, the answer to the objection was not that there were different causes of action, because the dispossession in one case was distinct from the dispossession in the other. The Judge did not direct his attention to that question, nor was it considered in the first Court; for no issue was framed about it. Only two issues were framed in the first Court, and neither of them applied to this question.

The decision of the Judge as regards the grounds upon which he has put it is wrong; but we cannot say upon the materials before us that there was only one cause of action, or that there was more than one. There being no issue on that point in the first Court, it is not likely that we should have any finding about it. It has not been properly enquired into, and an enquiry must be made before the objection taken by the defendant can be disposed of. Having made it in the written statement, we do not think he can now be precluded from insisting upon it, although no issue was raised in the first Court respecting it. He ought, strictly, to have got the issue framed, and to have insisted before the Subordinate Judge upon having that question tried. But we do not think we should be justified in refusing to let him have it tried now. What we must do will be to have it tried and determined whether there was any separate and distinct act of dispossession of the property which is the subject of this suit; or whether it was nothing more than a setting up the right upon which the order of the Deputy Collector mentioned in the plaint in No. 113 of 1868 was founded. If there was any separate act of dispossession, the Court will

have to find the time and manner of it. That will enable us to apply the law to the case.

As to the mode in which this must be tried, on a question of fact which this is the parties are entitled by law to have the opinion of both Courts, of the Subordinate Judge and of the Judge, we do not think we are at liberty with the case before us on a special appeal to take any course which would deprive either of them of that. Accordingly, we remand the case to the Lower Appellate Court with a direction that this issue is to be sent by that Court to the first Court to be tried by the first Court, and the finding returned to the Lower Appellate Court. Either will be at liberty to appeal against that finding. If there is no appeal, or if there is an appeal upon its being decided by the Judge, the finding will be sent to this Court and form part of the proceedings in the special appeal.

The 29th May 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Declaratory Decree—Possession.

Case No. 1301 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 27th June 1872, reversing a decision of the Sudder Moonsiff of that district, dated the 18th May 1871.

Ram Lochun Chuckerbutty and another
(Plaintiffs) *Appellants*,

versus

Ram Soonder Chuckerbutty (Defendant)
Respondent.

Baboo Aukhil Chunder Sen for Appellants.

Baboo Chunder Madhub Ghose for
Respondent.

In a suit for a declaration of title to a share of landed estate, although plaintiffs fail to satisfy the Court that

their title to the land has been acquired in the way they state, yet, if it is admitted that they have been in possession for more than twelve years, the effect of such possession is to extinguish other titles if these existed, and plaintiffs ought to have the declaration sought.

Couch, C.J.—IN this case, the plaintiffs being in possession of land sued to have a declaration of title to an 8-anna share of it, and, as they phrase it, for releasing the first plaintiff from liability under the spurious kubooleut which had been set up by the defendant, and for confirmation of proprietary right.

That there was a sufficient ground for bringing such a suit and for asking for a declaration of the plaintiffs' title appears from the fact that the defendant had in the Revenue Court set up a kubooleut as given to him by the first plaintiff, and had succeeded in obtaining a decision of that Court in his favor. Seeing the use which is made in this country of decisions of Revenue Courts and Magistrates, the plaintiffs may have reasonably felt some apprehension if this decision in favor of the kubooleut remained unquestioned. It is found by the first Court that the kubooleut is not proved, and in considering the questions before the Court we may assume that there was not a kubooleut.

The Moonsiff made a decree in favor of the plaintiffs in the terms that the plaintiffs' proprietary right to an 8-anna share in 1½ drones of lakheraj brihmottar land claimed be declared, and the plaintiffs were to have the costs of suit. This was a decree declaring that the plaintiffs were the owners of this land, that the title to the land was in them.

From this there was an appeal, and the Subordinate Judge was of opinion that the plaintiffs had failed to prove one of the instruments of gift by virtue of which they alleged they had become entitled to the land. The plaintiffs said their title was founded upon a gift to Ram Gopal, and a gift by Ram Gopal to Ram Lochun. Having found that the plaintiffs had failed to prove the gift to Ram Gopal, the Subordinate Judge reversed the decree of the Moonsiff, and ordered that the claim should be dismissed with costs. But he says in his judgment that it is true that the plaintiffs are in possession of the land in dispute, and it cannot be questioned that they had been in possession of the land in dispute for more

than twelve years. It would, therefore, be idle for us to send the case back to have that expressly found. Although the plaintiffs were in possession of the land in dispute, he held that he ought to dismiss their suit because they had failed to prove that they held possession under the title which they had set up in the plaint.

We think he was wrong there. What the plaintiffs sought was a declaration of title to this share in the land, and the first Court had given them that. They having been in possession of the land for more than twelve years, the title of any other person had been, to use the language of the Judicial Committee in the case in VII Weekly Reporter, page 22, and XI Moore's Indian Appeals, 362, extinguished in their favor. The effect of their possession was to extinguish other titles, if any existed; and we think in a suit of this kind, although they failed to satisfy the Court that their title to the land had been acquired in the way they stated, if in fact they are entitled to it, they ought to have a declaration to that effect, and not be driven to bring another suit in which they would omit any statement of the manner in which they became entitled, and simply say that they were entitled to it, and that they had been in possession of it for a great number of years, more than sufficient to bar all other claimants by the law of limitation, and ask for a decree on that ground. It would only

bring another suit to be brought, when a suit with the materials before it can get a decree declaring their title; and the possession is consistent with the title set out in the plaint.

The decision of Sir Barnes Peacock in a case* quoted for the respondent does not appear to us to apply to this case, because what he held was that the plaintiff in a suit asking for a declaration of his title to a *chowdah*, and failing to prove that, but only showing nineteen years' possession, could not have a decree declaring that particular title which he had set up. This, of course, he could not. The nature of the case, as appears from the papers, did not admit of the plaintiff's asking for what has been given to the plaintiff in this case by the first Court, namely, a declaration that he is the person entitled to the land.

We think, therefore, that the decree of the Subordinate Judge ought to be reversed with costs, and that the decree of the first Court restored.

The 29th May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Lease—Finding by Deputy Collector—Evidence.

Case No. 1195 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 14th March 1872, affirming a decision of the Moonsiff of Ranaghat, dated the 31st December 1870.

Unnoda Pershad Mookerjee (Plaintiff)
Appellant,

versus

Soorendronath Pal Chowdhry and others
(Defendants) *Respondents.*

Baboo Tarucknath Dutt for Appellant.

Baboo Unnoda Pershad Banerjee for Respondents.

Where a Judge took into consideration the finding of a Deputy Collector as to the genuineness of a lease, together with the appearance of the document and the fact that it had been filed 28 years previously, he was held to have erred, and the case was remanded for a determination of the question of the genuineness of the lease independently of the above decision.

Couch, C.J.—THIS was a suit for rent at enhanced rates, and one ground of defence was that the predecessor of the plaintiff had for a consideration granted a permanent lease at Rs. 151 to the persons whom the defendants represent.

The Moonsiff found that this lease had been granted, and on that ground he dismissed the suit.

In the appeal, it was objected that the lease had not been legally attested and proved; and the Appellate Court also considered that its genuineness was proved.

A decision of the Deputy Collector, in which it had been held that the lease was genuine, appears to have been used as evidence. The Judge, after discussing what was done upon the appeal from that decision, and considering whether on that appeal the finding of the Deputy Collector as to the genuineness of the lease had been affected, and coming to the conclusion that it had not, makes use of the decision thus. He says: "I do not therefore think that the Deputy

* See Foot note case at 14 W. R., Civil, 109.

Collector's finding on this latter point" (the genuineness of the deed) "is affected by the Additional Judge's order, and I consider the Deputy Collector's decision on this point is proof as to the genuineness of the lease propounded. The defendant in the case has not seen fit to adduce any further evidence on this point, but this decision taken into consideration with the appearance of the document and the fact that it has clearly not been fabricated for the purpose of this case, having been filed in Court 28 years before this suit, leads one to believe that the lease is undoubtedly a genuine document."

He thus clearly makes use of the decision as evidence of the genuineness of the lease, and from his expressions it would seem that he regarded it, if not as the sole evidence, certainly as the principal, because he speaks of its being taken into consideration with the appearance of the document and the fact of its having been filed 28 years ago.

It has been recently held by this Court, in a Full Bench reference in special appeals Nos. 1035 and 1036 of 1870,* that the decision of a Revenue Court as to the genuineness of a document of this kind is not conclusive between the parties. It is not conclusive as evidence or as an adjudication, and it follows from that decision and the reasons given by the Judges that the decision of the Deputy Collector which has been used in the present case could not be used as evidence. The ground of its not being allowed to be conclusive was that it was a decision on a matter which was incidentally cognizable in the Revenue Court for the purpose of determining the question which that Court had jurisdiction to try, and according to the well-known rule it would not be admissible in evidence.

Therefore, the Judge's considering this decision as evidence was erroneous, and looking at his judgment it is impossible to say that it did not materially affect his finding. We cannot say that, without it, there was enough to justify his finding as to the genuineness of the document, because there was nothing more than the appearance of the document and the fact of its having been filed 28 years before. We must remand the case for him to determine the question as to the genuineness of the lease, excluding from his consideration the decision of the Deputy Collector. The costs will follow the result.

* 19 W. R., 322.

The 29th May 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Refund—Stamp—High Court Jurisdiction—
Power of Government.*

In the matter of
Zoynooddeen Hossein Khan, *Petitioner,*

versus

The Secretary of the Board of Revenue for
the Lower Provinces, *Opposite Party.*

Baboo Kalee Mohun Dass for Petitioner.

Baboo Unnoda Pershad Banerjee for
Opposite Party.

The High Court has no power to issue a certificate authorizing a Collector to refund excess stamp duty paid in by a suitor by reason of over-valuation of his suit on the part of the Civil Court. The Government, however, may order such refund notwithstanding the absence of any special provision in the law authorizing them to do so.

Markby, J.—IN this case it is stated in the affidavit on which the rule was granted that the petitioner instituted a suit in the Court of the Subordinate Judge of Furreedpore for declaration of his malikkee right over a putnee tenure, and he alleged that the defendants executed a hiba in his favor in consideration of a diamond ring worth Rs. 30,000. The suit was valued at Rs. 5,600, being twenty times the malikana of Rs. 280, which the petitioner alleged he was entitled to. The Subordinate Judge, on an objection taken by the defendants that the stamp duty paid was insufficient, held that the plaintiff was bound to value his suit at Rs. 30,000, the consideration mentioned in the hibanamah. The plaintiff accordingly paid the deficiency; the suit proceeded and it

was ultimately dismissed. The plaintiff then appealed to this Court and again valued his appeal at Rs. 5,600; and that valuation appears to have been accepted by this Court without objection.

Now the plaintiff has come to us asking us to issue a certificate authorizing him to receive back from the Collector the difference between Rs. 330 and 975, which he alleges he was wrongly ordered to pay by the Subordinate Judge. A notice of this application was served upon the Board of Revenue, and the Government pleader has now appeared. He does not attempt to support the correctness of the decision of the Subordinate Judge; and he states that the Government are willing, if the Court think it can be done, to refund the excess fees so paid; but he submits that the Government have no power to do so of its own motion, and that this Court has no power to order it to be done.

Now the only question upon which we can now express any authoritative opinion is as to whether or not this Court can order that money to be refunded by issuing a certificate as asked for. We think we are bound to say that we have no such power. This Court can only order a refund in such cases as it is specially authorized to do so. And what those cases are is stated in Sections 13, 14, and 15 of the Court Fees Act under which, in the cases specified, certificates authorizing refunds may be granted; but this case does not fall within the language or spirit of either of those Sections. There appear to be two cases in which this Court has acted upon those Sections. One is reported in *Sevestre's Reports*, Volume XII, page 81,* and the other case is also reported in *Sevestre's Reports*, Volume IX, page 176.† We think it is impossible to bring this case within those decisions, and therefore we must reject the application which asks us to issue a certificate authorizing the petitioner to get a refund from the Collector. But at the same time, as we have been asked to do so, we have no hesitation in expressing our opinion that, if the Government think that the plaintiff had been improperly ordered to pay a sum of money which was not due, there can be no possible difficulty in their refunding that amount to him notwithstanding the absence of any special provision of the law authorizing them to do so.

* 6 W. R., Mis., 65.
† 13 W. R., 434.

The 29th May 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Pottah and Kuboolent—Registration—Consideration—money—Refund—Damages.

Case No. 145 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 28th March 1872.

Monomothonnath Day (Defendant) *Appellant,*
versus

Sree Nath Ghose and another (Plaintiffs)
Respondents.

Baboos Kalee Prosunno Dutt and Gopal Lall Mitter for Appellant.

Baboos Kalee Mohun Doss, Romesh Chunder Mitter, and Ram Churn Mitter for Respondents.

A pottah granting an ijarah and a kuboolent in similar terms having been executed respectively by, and exchanged between, plaintiffs and defendant, when the parties went to register the pottah the defendant refused to allow it to be registered, alleging that the plaintiffs had not performed certain conditions which were incumbent on them before they were entitled to the ijarah. Plaintiffs then sued defendant for a refund of the deposit money and damages:

Held that this suit was brought, not upon the pottah and kuboolent, but on an implied contract by the defendant to do that which was necessary to give effect to his own pottah, viz., to allow it to be registered, and that the real question was whether the plaintiffs had done all that they were required to do to entitle them to the assent of the defendant to registration.

As the pottah had been executed and handed over, if it specified no pre-requisite conditions, the natural presumption was that no such conditions existed; although that presumption might be rebutted by sufficient evidence.

Damages for a breach of contract of this kind, though not necessarily the same as for keeping a person out of possession, would yet be the loss occasioned to plaintiff by the contract not having been performed.

Held, further, that although the amount, the refund of which is sued for, was in fact in deposit for the rents of the old lease which had not yet expired; yet as defendant had abandoned that lease, and entered into a new arrangement as regards the deposit, he could not now fall back on the old contract once abandoned, nor could he retain the money under the new contract which he had wrongfully refused to carry out.

Markby, J.—THIS was a suit brought for refund of a deposit of Rs. 3,000 which had been made in contemplation of the plaintiffs obtaining an ijarah of certain property, and for compensation by way of damages from the defendant for not having given them that ijarah. It appears that

prior to this arrangement, an ijarah somewhat of a similar character to that now in question was held by the two present plaintiffs, Sree Nath Ghose and Omur Nath Ghose, and a lady of the name of Kadumbinee Dossee, the mother of Omur Nath; that before the term of that ijarah had expired, negotiations were commenced some time in the year 1272 for granting a new ijarah to the two plaintiffs, excluding Kadumbinee; that ultimately, in March 1868, a pottah granting that ijarah was actually executed by the defendant and handed over to the plaintiffs, and a kubooleut in similar terms was executed by the plaintiff Omur Nath and handed over to the defendant; but a few months later, when the parties went to register that document, as is necessary in order to make it an effectual document under the Registration law, the defendant refused to allow it to be registered, alleging certain objections, the substance of which was that the plaintiffs did not perform certain conditions which the defendant alleged it was incumbent on them to perform before they were entitled to the ijarah, and consequently the plaintiffs brought this suit for breach of contract. The defendant has now repeated his allegation that, in consequence of the plaintiffs not having performed what he alleges to be the conditions precedent to their right to this ijarah, he is not bound to assent to the registration of the document.

A question has been raised as to whether this suit can be maintained, because it is said that the document not being registered it cannot be used as evidence; and that, in fact, until the document is registered there is no complete contract between the parties. But that question, we think, has been perfectly answered by the Subordinate Judge. In his very clear and able judgment he has pointed out that the real nature of this suit has been mistaken by the defendant. It is not a suit brought upon the pottah and kubooleut, but a suit upon an independent contract, namely, an implied contract by the defendant to do that which is necessary in order to give effect to his own pottah, namely, to allow it to be registered. It is a suit precisely of the same character as that in the case referred to in the judgment of the Subordinate Judge, and reported in the XII Weekly Reporter, page 11; and as is pointed out there by Sir Barnes Peacock in delivering the judgment of the Court, it would be monstrous if a party could take advantage of the Registration law for the purposes, first, of refusing to carry out his own contract to regis-

ter a document, and then of protecting himself in a suit which might be brought against him for a breach of that contract, by saying that the document cannot be used as evidence because it is not registered. And Sir Barnes Peacock says, that it is only reasonable to put such a construction on the Registration Act as would prevent such consequences as that, and that the contract may be given in evidence for the purpose of showing what the intention of the parties was, in a suit for refusing to register.

Then the Subordinate Judge points out that the real and main question between the parties is as to whether the plaintiffs have done all that they were required to do in order to entitle them to call upon the defendant to assent to the registration of this document; and he states that when the case was before him there were five objections made by the defendant; first, that Sree Nath Ghose, one of the plaintiffs, had not signed the ijarah kubooleut; secondly, that the relinquishment in respect of the two annas share of Kadumbinee was without her authority, and that the sum of one Rs. 1,000 which had formerly been deposited in the name of Kadumbinee has not been transferred; thirdly, that the balance due by Kadumbinee had not been paid by the plaintiffs as agreed; fourthly, that the plaintiffs failed to pay the remainder of the ijarah salamee; and fifth and lastly, that the plaintiffs did not cause an enquiry to be made into the validity of the security which the defendant found was not sufficient, as the properties pledged in it were previously encumbered.

Now, we do not think it necessary at all to go over again the same ground which has been gone over by the Subordinate Judge with reference to these five objections. He has given reasons, which are quite satisfactory as regards all of them, for holding that the evidence does not establish that these were conditions to be performed by the plaintiffs in order to entitle them to this ijarah. He has remarked, and we think rightly, that had that been so, those conditions would in all probability have been recited in the pottah. The pottah having been actually executed and handed over to the plaintiffs, it would have been only in accordance with the ordinary course of business that, if that pottah was not to take effect from the moment of its delivery, the conditions which were to be performed in order to make it effectual would have been stated in the instrument itself. Then the Subordinate Judge goes on to say that though it is a

natural presumption that arises from a perusal of the pottah that no such conditions ever existed, yet that presumption may be rebutted if the defendant can establish by evidence that there was between the parties an understanding that those were the conditions to be performed by the plaintiffs before the *ijarah* pottah became effectual. He then points out, and we think quite satisfactorily, that there is really no evidence upon the record to prove that any such conditions were entered into. One of the conditions that has been most relied on is the arrangement as to the security. Now, upon that point it appears to me that the defendant attempts to shift his ground. What he distinctly alleged when his pleader was examined, and what he evidently contended before the Lower Court, was that the condition upon which the *ijarah* was granted did not become effectual until the security had been enquired into. But there is no evidence whatever of such condition; because we think we are bound to read the evidence given by the defendant's *dewan* in the sense in which the Subordinate Judge who heard the evidence understood it, and as is quite consistent with the words in which it has been recorded in Bengalee and the translation placed before us. All that the *dewan* was understood by the Subordinate Judge to say was that the document was to be registered within the prescribed time; and from the observations which the Subordinate Judge makes upon the evidence of that witness, there can be no doubt that what the defendant is now attempting to establish with regard to that point is somewhat different, namely, not that the enquiry into the security was adjourned, but that the defendant was induced to accept the security by a fraudulent statement made by the plaintiffs that there were no incumbrances on the property. That is a perfectly different case from that which the Subordinate Judge says was made before him. It is quite impossible that, if that case had been made before the Subordinate Judge, he would not have overlooked it; and we think, looking to the written statement, the examination of the pleader, and particularly to the grounds of appeal to this Court, that notwithstanding that the word "fraud" is used at the end of the fifth paragraph of the written statement as a sort of winding up of that paragraph, no distinct allegation of that kind was made by the defendant. We may, therefore, fairly presume that the plaintiffs did not know that it was intended by the defendant to make any such case against them, and we think we shall

ing very great injustice to the plaintiffs if we allow the defendant to set up a case like this for the first time in appeal when the plaintiffs have had no opportunity of meeting it.

Now, in addition to the matters which were noticed by the Subordinate Judge in his judgment, one or two other matters have been suggested to us. It is said that Sree Nath Ghose, the second plaintiff, was not examined by the Subordinate Judge. It is, no doubt, true that somewhat late in the trial of the case, but still before the judgment was delivered, an application for the examination of Sree Nath Ghose was made, and he was ordered to attend; but as to what actually passed before the Subordinate Judge, we can gather very little from the orders which are upon the record, and which were made on the petitions presented to the Court. We think that the Subordinate Judge was fully able to estimate far better than we can do what the real value of that part of the case is. It may very well be, and we may fairly assume that it was so, that he saw perfectly plain that there was no real desire on the part of the defendant to examine Sree Nath Ghose.

Then another point has been made here, namely, that the kist for the month of Assar, which fell due before the expiration of the time of registration, was not paid. Now, no doubt, it would be quite reasonable that when the defendant was called upon to complete the contract of *ijarah* by registering it, he should require that that kist should be paid. But there is no reason to suppose that, if the defendant had asked for it, the plaintiffs would not have paid it; and had this been the real reason for not granting the *ijarah*, the defendant would have undoubtedly mentioned it in the petition of objection which was presented by him at the time of registration. Moreover, this point does not appear to have been in any way relied upon by the defendant in the Court below, and we think we should not give any effect to it.

Then as to the question of damages, it is said in the first place that the whole of the Rs. 3,000 has not been paid because it appears from certain accounts which the plaintiffs themselves have filed that something in the shape of discount was taken off from that amount. But it seems to us to be a sufficient answer to that to say that there is upon the record a sworn statement made by the defendant himself before the Police in the case instituted by him against the plaintiffs for cheating; and that in that statement, he distinctly admitted that he had

received the Rs. 3,000 from the plaintiffs, and kept that amount in deposit. Now the defendant does not come forward to explain or modify that statement by giving his own evidence in this case. We think, therefore, that the Subordinate Judge is justified in holding that the Rs. 3,000 had been paid by the plaintiffs to the defendant. Then it is also said that the damages were estimated upon a wrong principle. We are quite willing to concede the correctness of the argument on behalf of the appellant that the damages for a breach of contract of this kind are not necessarily the same as damages for keeping a person out of possession of the property; but the damages to which a person is entitled for a breach of contract would be the loss which had been occasioned to him by the contract not having been performed; and under the circumstances of this case, we do not think it unreasonable in estimating that loss to see what the plaintiffs would in all reasonable probability have earned had they got possession of the property under the *ijarah*. In cases of this kind, damages can only be a matter of estimation, and we do not see any reason to come to a conclusion that the estimation made by the Subordinate Judge is otherwise than a fair and reasonable one.

Then, lastly, it is contended that at any rate the plaintiffs are not entitled to recover the Rs. 3,000 which were deposited with the defendant as security for carrying out the conditions of the *pottah*, until they pay off all the rents due during the whole time that they remained in possession. Now, as we pointed out during the argument, that is really relying upon the terms of the very contract which the defendant refused to carry out. It was only upon the understanding that the plaintiffs were to have the *ijarah* *pottah* delivered to them that that Rs. 3,000 was deposited with the defendant, and the defendant having by his own act prevented that arrangement being carried out, he cannot now fall back upon it. It is argued that that money had in fact already been in deposit for the rents due under the old lease which had not expired. Now, we are not prepared to say that if the defendant's conduct were wholly unimpeachable, and for some reason or other over which he had no control the contract could not have been carried out, he might not then in equity claim to hold the deposit under the old contract. But he has chosen to abandon that; he has chosen to do that which really amounts to the same thing as if the whole of

that deposit were paid in cash under the new arrangement. He can have no claim under the old contract because he has abandoned it and entered into a new arrangement, and equally he cannot now fall back upon that new arrangement because he has wrongfully refused to carry it out. Therefore, even if he has any claim for the rents of the year 1274, we do not think he can claim this Rs. 3,000 or any part of it, because he does not hold it under any contract that he should do so.

We think, therefore, in all respects that the decree of the Lower Court is right, and that it ought to be affirmed, and this appeal dismissed with costs.

The 30th May 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Registration—Fraud—Act XX of 1866 s. 50.

Case No. 1070 of 1872.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 22nd April 1872, affirming a decision of the Moonsiff of Kaleegunge, dated the 15th September 1871.

Dookhai Meer (one of the Defendants)
Appellant,

versus

Shaikh Nassir (Plaintiff) *Respondent,*

Baboo Bhyrub Chunder Banerjee for
Appellant.

Baboo Jogendro Nath Bose for *Respondent.*

A bill of sale got up by fraud, even if registered cannot prevail against a *bond fide* bill of sale which is not registered.

Markby, J.—In this case the Lower Appellate Court has found as a fact that, in consequence of a dispute which arose at the time of the plaintiff's purchase, the defendant has, as the Lower Appellate Court expresses it, got up a *kobalah* dated two days prior to that of the plaintiff, and got it registered.

It is now contended that as the bill of sale of the defendant was registered and the

plaintiff's bill of sale was not registered, therefore, under the provisions of Section 50 of the Registration Act XX of 1866, the defendant's title must prevail.

Now the finding of the Lower Appellate Court amounts to this, that the defendant has committed a fraud, and in the case reported in the 1st Bengal Law Reports, Full Bench Rulings, page 82,* Sir Barnes Peacock says, that "under Section 50 of the Registration Act, the word 'instrument' refers to an honest *bonâ fide* instrument, and does not include a fraudulent one. If a man should get a fraudulent deed registered before an honest one, he could not, under Section 50, rely upon that document as an instrument. It is a well-recognized maxim of law that no man can gain title by fraud." This construction of the law seems to us to be a reasonable one, and we entirely agree with it. Therefore, on that ground, the plaintiff appears to have a better title notwithstanding that the defendant's kotalah was registered, and the decision of the Lower Appellate Court is right.

The appeal will be dismissed with costs.

Having disposed of the appeal, and observing that, as already stated, the findings of both the Lower Courts amount to a finding of a deliberate fraud on the part of the defendant Moolam Khan, and also on the part of Sufferuddee Meer, the son of Dookhai Meer, who is not nominally a party to the suit, and whom the Moonsiff considered to have been one of the principal actors in getting up this fraudulent deed of sale, and possibly also on the part of the defendant Dookhai Meer, we think we ought to follow the same course as that which was followed by a Bench of this Court consisting of the Judges in a case (in the 5th Weekly Reporter, page 61) of a very similar kind; and we therefore direct that the case should be sent to the Magistrate of Dacca, in order that he may investigate it and consider whether there is any ground for instituting criminal proceedings against either of those three persons under Section 415 of the Penal Code, or under Section 423 or 464 of the same Code. A copy of this judgment, together with the record, will be forwarded to the Judge of Dacca, requesting him to send them to the Magistrate of that district for investigation. The record will be returned to this Court when the enquiry is completed.

* 10 W. R., F. B., 51.

The 30th May 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Amendment of a Decree—Jurisdiction.

Case No. 97 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 21st December 1872.

Goluck Chunder Mussant and others
(Judgment-debtors) *Appellants*,

versus

Gunga Narain Mussant and others (Decree-holders) *Respondents*.

Baboo Doorga Mohun Doss for *Appellants*.

Baboo Bhowanee Churn Dutt for
Respondents.

A decree, dated 13th July 1868, dismissing a suit, having been found incapable of execution because it did not contain any direction by whom the costs were to be paid, the decree-holders, acting upon a suggestion contained in the judgment of the High Court, had the decree amended on 21st August 1872 by the Court by which it was passed.

After the opinion expressed in several decisions of the High Court in favor of such an order as the above amending a decree, a Division Bench considered it too late to hold that such an order could not be made.

Quære.—Is it in the power of a Judge in the mofussil under the Code to amend a decree which has been confirmed in the presence of the parties by the High Court in appeal?

Markby, J.—In this case it appears that a decree was passed on the 13th July 1868. That decree was brought up to this Court upon appeal, and was confirmed by this Court on the 18th June 1869. The present respondents were defendants in the suit, and it is said that it appears from the judgment that it was the intention of the Court to dismiss the suit as against them and to give them their costs. The respondents, however, took no proceedings in execution until the 13th December 1871, and when they applied for execution it was discovered that the decree did not contain any direction by whom those costs were to be paid. It was consequently held by this Court that they, respondents, could have no execution upon this decree. Thereupon, acting upon a suggestion, contained in the judgment of this Court, the respondents, on the 21st August

1872, obtained from the Judge of the Court in which the original decree was passed an order amending the decree by inserting the names of the parties from whom they were to obtain their costs. That amendment, as we are informed, was made in accordance with the judgment which had been passed. Then proceedings in execution were again commenced, and an order for issuing execution was made on the 21st December 1872, which is now before us on appeal.

An objection has been taken to that order that it has wrongly disposed of the question of limitation which was then raised before the Court. Upon that point we see no reason whatever to differ from the decision of the Court below.

The main question which has been argued is that the present execution proceedings cannot be sustained, because the Court had no power to amend the decree on the 21st August 1872. Now, on looking into the record, it appears that that order of the 21st August 1872 was not an order passed in review under Chapter XI of the Code of Civil Procedure, but was what is called a miscellaneous proceeding such as was suggested by a decision of this Court reported in the 9th Weekly Reporter, page 471; and whatever might have been our opinion independently of any authority as to the power of a Judge in the mofussil under the Code to amend a decree which has been confirmed in the presence of the parties by this Court on appeal, we think it is too late now, after that decision which we have just referred to and the other decision in the 11th Weekly Reporter, page 142, and also the expression of opinion of Mr. Justice Kemp and Mr. Justice Glover in this very case, for a Division Bench to hold that such an order cannot be made. It appears that several Judges have expressed an opinion that such an order can be made, and it also appears from the decision in the XI Weekly Reporter that such an order is open to appeal. And the order of amendment in this case having been made on the 21st August 1872, it is too late now to question it by way of appeal; and therefore being an order which the Court had power to make, and not having been appealed against, it must be taken as final. At the same time we think it right to add that, had this order been now open to question, we should have hesitated very much before confirming it. It is the duty of the parties, or rather of their pleaders, when they obtain a decree, to see that it is drawn up in the proper form, and it has been ordered

by a Circular Order of this Court of the 19th July 1867* that the Judges should obtain the signatures of the pleaders before the decree is finally signed. If the parties choose to allow so long a time as that allowed in this case to elapse before they take any steps upon the decree without taking any precaution to see that the decree is properly drawn up, it seems to us that it may be fairly presumed that they acquiesced in the decree, and that no alteration ought to be made subsequently.

As, however, we have no power to interfere, the appeal must be dismissed with costs.

The 31st May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Pleading one's own Fraud—Admission—Estoppel.

Case No. 1318 of 1872.

Special Appeal from a decision passed by the Judge of Jessore, dated the 3rd May 1872, affirming a decision of the Sudder Moonsiff of that district, dated the 11th May 1871.

Sreenath Roy (Plaintiff) Appellant,

versus

Bindoo Bashinee Debia and another (Defendants) Respondents.

Mr. M. M. Ghose and Baboos Woomee Chunder Banerjee and Bungshee Dhar Sen for Appellant.

Baboos Sreenath Doss and Mohinee Moh Roy for Respondents.

A party claiming under another who has made admissions as to a transaction to which that other was a party is at liberty to allege and prove that the admissions were made with a fraudulent purpose and were not true, in order to show the real nature of the transaction.

Couch, C.J.—THE first Court appears to have found that the jote was only colorably created by Sulimoola in the name of his mother. The Judge of the Lower Appellate Court says, that he concurs with the Moonsiff in thinking that the plaintiff "has failed to

"establish that the jote ever existed as a real *bonâ fide* separate property distinct from the talook, though there can be no doubt that it has for a long time had a nominal existence."

It is now objected that the defendant whose title is through a mortgage, which has since been foreclosed, from the son of Ashrufounnissa, is concluded by the statements of Ashrufounnissa, and that he is not at liberty to show that the creation of the jote was only colorable, and that, as the Lower Court has found, it had only a nominal existence.

Decisions in this Court have been referred to which appear to support that proposition. That of Mr. Justice Norman certainly goes to that extent. But this is a question which has undergone much consideration in the Courts in England. It is to what extent a person shall be at liberty to allege and prove fraud in a matter in which he was a party, or shall be at liberty to allege and prove that any admissions made by him were made with a fraudulent purpose and were not true, and also to what extent persons claiming under any one who has made such admissions will be at liberty to do the same. In one of the cases in this Court, the learned Judges who decided it seem to have held that the law of England ought not to be followed in this country. We must say that, in a matter of this kind, we cannot see any ground for making a distinction between the law in India and the law in England. The law in England is not founded upon anything peculiar to that country. The question how far a person should be at liberty to show the real truth of a transaction is one upon which we do not see there should be any difference here and elsewhere. For the law in England

may quote *Symes v. Hughes*, Law Reports, 9 Equity, 475. But in fact this question has been set at rest by the authority which lays down the law for India, and any decision in this Court to the contrary must, we think, be considered as no longer the law.

There is a case in XIII Moore's Indian Appeals, page 551,* in which two of the defendants in the suit had made a statement respecting a mortgage transaction with the object of defeating the plaintiff's claim, which statement was false, and in a foreclosure suit which was afterwards brought by one of them against the other, the statement was sought to be made use of.

The Judicial Committee of the Privy Council held that the defendants in that suit might plead that the statement which they had formerly made was false and intended as a fraud on the third party, and that the admission in their answer would not amount to an estoppel as between them. That is about as strong a case as could well be put, and their Lordships say in their judgment that there was nothing to prevent the defendants in the case from showing the real truth of the transaction.

At page 585 of the same volume, there is another decision of the Judicial Committee* to the same effect. There, in a suit to redeem a mortgage, a person to avoid an objection which was taken as to the parties to the suit, filed a petition disclaiming all interest in the estate. At that time she had an expectant right only to the estate, and she subsequently became absolutely entitled; and it was held, in the first place, that the petition could not operate as a conveyance, and next, that the statement in the petition was no estoppel, and that she was at liberty to show the real truth of the transaction. Their Lordships said:—"It is very difficult to see how she can possibly be estopped." "The real effect of the petition seems rather to be that they mutually agreed to represent what was not the fact, for the purpose of enabling a certain suit to be carried on;"—and they were of opinion that the petition could not possibly operate either as a conveyance or as a contract to convey, nor by way of estoppel so as to deprive the plaintiff of her right to recover all these properties. In a case in XVIII Weekly Reporter, page 493, these decisions were followed by myself and Mr. Justice Ainslie. In that case it was admitted that an instrument of gift had been executed, and evidence was offered to show that it was really a colorable transaction, and the question that we had to decide was whether the person against whom an admission of the gift was used might show that it was only colorable, and that the property was not intended to pass, and really did not pass. We held that he might show the real nature of the transaction.

We think that in this case the defendant was at liberty to show that the creation of the jote was only colorable, and that no jote was really created. This might perhaps be considered as a stronger case in favor of the defendant, because he is not a person

* 15 W. R., P. C., 14.

* 15 W. R., P. C., 16.

claiming by inheritance, but is apparently a *bonâ fide* purchaser of the estate for value.

The appeal must be dismissed with costs.

The 31st May 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Act VIII of 1859 s. 230—Onus Probandi—
Possession—Limitation—Title.*

Case No. 1198 of 1872.

*Special Appeal from a decision passed by
the Officiating Judge of East Burdwan,
dated the 29th May 1872, affirming a
decision of the Subordinate Judge of
that district, dated the 30th September
1871.*

Brindabun Chunder Roy (Plaintiff)
Appellant,

versus

Tara Chand Banerjee (Defendant)
Respondent.

*Baboos Romesh Chunder Mitter and Rash
Beharee Ghose for Appellant.*

*The Advocate-General and Baboos Taruch
Nath Sen and Kalee Prosunno Dutt for
Respondent.*

Under Act VIII of 1859 s. 230 a party who has been dispossessed in execution of a decree to which he is not a party, though he may not, on mere proof of *bonâ fide* possession, claim to be restored, yet he can on such proof call upon the defendant to prove his title.

A person in possession without title has an interest in the property good as against all the world except the true owner, which interest is capable of being dealt with, until the true owner interferes, just in the same way as if it were unimpeached, and it therefore passes by conveyance, or devise, or by an execution-sale.

Such interest so passed confers an unimpeachable title which becomes complete as soon as the true owner's claim is barred by limitation, the practical effect of whereof is to extinguish his title in favor of the party in possession.

Markby, J.—THE facts of this case as stated to us are that one Dad Ali, who was then owner of certain immoveable property, became insolvent in the year 1853.

The property now in suit was sold together with several other properties by the Official Assignee to one Tara Chand in the year 1856.

In the year 1867, Tara Chand commenced a suit to obtain possession under his purchase of this and the other properties. The suit was instituted against the heirs of Dad Ali; but several other persons applied to be made defendants in the suit claiming various portions of the property under different titles. On the 14th May 1869, Tara Chand obtained a final decree which included this property.

On the 19th May 1870, Tara Chand, in execution of his decree, took possession of this property.

On the 16th June 1870, the plaintiff presented a petition under Section 230 of the Code of Civil Procedure, alleging that he was in *bonâ fide* possession of that portion of the property to which the present suit relates, and that he was not a party to the suit in which the former decree was passed. Accordingly his application was, as the Code directs, registered and numbered as a suit.

The plaintiff has now proved that, in execution of a decree passed in the year 1852 against Dad Ali, execution was taken out after Dad Ali's death under Section 210 against the heirs of Dad Ali, and that the property he now claims was sold in execution of that decree in the year 1864. At that time, the heirs of Dad Ali were in possession. The plaintiff took possession under his purchase, but when exactly is not stated, but at some time prior to 1867. He was not made a party to the suit brought by the defendant in 1867. The District Judge thinks that the execution-creditors, when they took these proceedings in execution, must have known that Dad Ali's heirs were not entitled to the property; but he says that it was stated on behalf of the defendant that no collusion or complicity was charged against the plaintiff.

Both the Lower Courts have dismissed the suit.

The plaintiff appeals and raises two contentions: first, that the title of the defendant Tara Chand was extinguished in favor of himself as soon as the twelve years from the date of his purchase had elapsed, and that he has therefore proved his title; secondly, that, under Section 230, he ought to be restored to possession, even without proof of title, upon proof that he was *bonâ fide* in possession and that he was not a party to the suit.

The second point is, I think, stated too broadly. I am not prepared to say that, under Section 230, a party who has been dispossessed in execution of a decree to which he is not a party can, on mere proof of *bonâ fide* possession, claim to be restored.

But I think he can, on mere proof of *bonâ fide* possession, call upon the defendant to prove *his* title: and that I understand to be the result of the judgment of the Chief Justice in 5 B. L. R., 708.*

The question, therefore, arises, has the plaintiff proved his title? I think he has not. It seems to me that we cannot hold that he has done so without impugning doctrines that have been already clearly laid down in this Court and in the Privy Council. It has been laid down by the Privy Council in the case of Gunga Gobind Mundul, XI Moore, page 345,† that "the law has established a limitation of twelve years; after that time it declares not simply that the remedy is barred, but that the title is extinct in favor of the possessor." And in an earlier passage they say that the right to sue for dispossession belongs to the owner of the lands encroached upon, and if he suffers his right to be barred by the law of limitation the practical effect is the extinction of his title in favor of the party in possession. It also appears to me to be an accepted doctrine in our Courts, that if a party who has been twelve years out of possession, and whose suit is therefore barred, should again get into possession, he is not (to use an English phrase) *remitted* to his old title; our Courts adopting, as pointed out by Sir Lawrence Peel in I Boulois' Reports, page 79, the English rule that there is no remitter to a right for which the party had no remedy by action at all. This decision was quoted and approved of by Loch and Mitter, JJ., in XII Weekly Reporter, 193; and the principle here laid down has been applied exactly in the same way to the English Statute of Limitations (see, *Brassington v. Llewellyn*, 27 L. J., Ex., 297). I may add that the decision in Gunga Gobind Mundul's was given upon the law of limitation as it existed prior to 1859, but the principle of that decision has been frequently applied to Act XIV of 1859, which governs the present case.

The question, therefore, comes to this;—had the defendant allowed his right to be barred by the law of limitation? It seems to me that he had. His cause of action arose when his purchase was completed in the year 1856. His right (as he himself admits) to possession was then denied by Dad Ali, and subsequently by Dad Ali's heirs. Nevertheless he did not commence any suit to recover possession till the year 1867; and the per-

sons whom he then sued,—the heirs of Dad Ali,—had then parted with their interest in, as well as their possession of, this portion of the property: and (if it has any bearing on this point) the Lower Appellate Court finds that the defendant must have known, when that suit was brought, that the plaintiff was in possession of this property. I think, therefore, that this stands as a simple case in which the party out of possession has omitted to sue upon his cause of action for twelve years; that his right is thereby barred; and that his title is extinct. Hence it follows that, even if the plaintiff has proved no title, still the defendant has proved none either; and that therefore under Section 230, the plaintiff ought to be restored to possession.

But I also think (which is the plaintiff's first contention) that the plaintiff has proved his title. The Privy Council say in the case of Gunga Gobind Mundul, not only that the title of the party whose right is barred by the Statute of Limitation is extinguished, but that it is extinguished *in favor of the possessor*. When the twelve years expired in this case the plaintiff was in possession, and was he "the possessor" within the meaning of this rule? I understand it to be admitted by the Advocate-General, and I think it cannot be disputed, that by the possessor is here meant not only the person in original possession, but any person who comes in under him during the twelve years by inheritance, will, or conveyance. But if this be so, I do not see how the plaintiff can be excluded. I understand the principle of law to be that a person in possession without title has an interest in the property good as against all the world except the true owner, which interest is capable of being dealt with, until the true owner interferes, just in the same way as if it were unimpeached, and that it therefore passes by conveyance or devise. Why then should it not pass by an execution sale? The plaintiff as purchaser at an execution sale received a certificate, which is by law (Section 259 of the Code of Civil Procedure) "a valid transfer of the right, title, and interest of the judgment-debtors in the property sold." Dad Ali was the judgment-debtor and died in possession. His interest in the property, though without title, was of such a nature as would pass by inheritance to his sons (*Doul Curter v. Barnard*, 27 L. J., Q. B., 808). It did so pass; and afterwards passed by the execution proceedings from his sons to the plaintiff just as completely as by a private sale. As against all the world, except the defendant, that execution sale

* 13 W. R., F. B., 80.

† 7 W. R., P. C., 21.

passed to the plaintiff an unimpeachable title : and as soon as the defendant's suit was barred, the plaintiff's title was complete.

The conclusion that the plaintiff's title is necessarily established if the defendant's title is barred seems to me warranted by good sense as well as by law. It seems to me to be almost an absurdity that there should be any case of land without an owner when there is a person in possession of it who cannot lawfully be disturbed.

I base this decision on the assumption, which is warranted by the judgment of the Lower Appellate Court, that the plaintiffs acted in good faith in purchasing this property. Had the plaintiff obtained possession of the property by fraud or violence, it may be that the case would have to be considered under a somewhat different aspect.

The decisions of both the Lower Courts will be reversed, the decree dismissing the suit will be set aside, and the plaintiff will have a decree for possession, with costs in this Court and the Courts below.

Birch, J.—The plaintiff derives his title under a purchase at an execution sale. The defendant claims the property under a prior conveyance from the Official Assignee, as representative of Dad Ali, the original proprietor. No distinction can be made between a person claiming under an execution sale as contra-distinguished from a person claiming under an ordinary conveyance.*

* *Enayut Hossein v. Defendant purchased Gridharee Lall, 2 B. L. R., on the 3rd December P. C., 78; 11 W. R., P. C., 29. 1856, plaintiff purchased in 1863. Defendant could not get possession from Dad Ali or his heirs. The plaintiff succeeded in obtaining possession in 1864 without the intervention of the Court. In 1867, nearly eleven years after his purchase, defendant brought a suit against Dad Ali's heirs for confirmation of his title and possession; but he did not make the present plaintiff, though then in possession, a party to the suit. Defendant obtained a decree, and in execution thereof dispossessed the plaintiff on the 16th June 1870. The plaintiff comes into Court under Section 230, alleging that his possession was rightful, and that he was no party to the decree under which the defendant has taken possession of his property. Under Section 230, the applicant is not bound to do more than prove that he was really and *bonâ fide* in possession; he is not bound to start his case by*

† 5 B. L. R., page 708; proving his title.† 13 W. R., F. B., 80. The matter in dispute

is the right of the decree-holder to dispossess the applicant, and the decree-holder is at liberty to give evidence of his title and prove that the property really belongs to him. Unless the decree-holder can show a better title than the applicant, the latter ought to be restored to possession. Both the Courts have found that the plaintiff is an innocent purchaser free from all imputation of collusion with the judgment-debtors, and that he has been in possession of the property since 1864. Under cover of the decree obtained against the heirs of Dad Ali, defendant has succeeded in dispossessing the plaintiff. He could not have done this by any regular suit, as he would have been barred by limitation. He could not dispossess the plaintiff until he had succeeded in setting aside the execution sale and the right acquired thereby. There is no provision in the Indian Limitation Act, XIV of 1859, analogous to that of Section 34, 3 & 4 William IV, c. 27, which declares that the right and title of the party out of possession is extinguished at the end of the period of limitation prescribed by the statute. But it has been held by the Privy Council, and by this P. C., 21.

Court in several rulings following on that judgment that, if a person suffers his right to sue for title to be barred by limitation, the effect of his laches is the extinction of his title in favor of the person in possession. And I apprehend it to be now well established that, when his remedy is barred, the right and title of a claimant is extinguished and transferred to the person in possession. The dispossession of the plaintiff by the Nazir was in reality wrongful, as he was no party to the suit; had the Court ordering execution known how the matter stood, no order for dispossession could have been given under Section 223. And it would be inequitable to hold that the plaintiff's position is to be damaged by a wrongful dispossession, and that he is to be put to proof of his title when, had his possession been undisturbed, it was good against all the world. The defendant's remedy, if he ever had any, against the plaintiff is barred, and his right and title is extinguished in favor of the plaintiff. I concur in thinking the plaintiff entitled to a decree.

The order of the Lower Court must be reversed and the appeal decreed with costs.

The 2nd December 1870.

Present :

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Estates—Julkur Rights—Right to Alluvion.

Case No. 71 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 19th January 1870.

The Government (Defendant) *Appellant,*

versus

Baboo Radhay Singh (Plaintiff) *Respondent.*

Baboo Onookool Chunder Mookerjee for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

An estate does not necessarily mean land, but may denote julkur, phulkur, or bunkur rights: and even where land has been entirely washed away, there still remains the right to possession of any alluvion that may subsequently reappear on the same site, which right may, in accordance with the Privy Council decision in *Lopez v. Muddun Mohun Thakoor and others* (XIV W. R., P. C., 11), be sold as an estate.

Glover, J.—THE plaintiff in this suit claimed to recover from Government Rs. 6,798-15-9½, together with interest, on account of the mehal No. 400, Sewai Teekarampore, purchased by him at an auction-sale for arrears of revenue on the 27th of July 1863, but which he now alleges had no existence at the time of the sale, having been previously washed away by the river Gunduk. His claim is made up of two items; one of Rs. 760-5-3½, the amount with interest of the purchase-money, the other of Rs. 6,038-10-6½, the amount with interest of the payments of Government revenue on the mehal from the date of purchase to the 28th of February 1867.

The Government, defendant, replied that the Collector was bound by law to sell the estate as it had fallen into arrears, and that he had no means of knowing whether the lands of it were existent or not at the time of the sale; that the plaintiff retained his name on the towjee and paid the revenue long after he knew that the lands of Sewai Teekarampore had been completely diluviated, for the purpose of getting possession as accretions to his purchased estate of lands belonging to another mehal, and it is because he failed in his attempt that he has brought the present suit.

The Subordinate Judge held that Mouzah Sewai Teekarampore had no existence at the time of the sale to plaintiff, and that therefore Government, which guaranteed the existence of an estate, was bound to refund money paid under a mistake. He held further that the Collector, when he sold the mouzah, knew, or had the means of knowing, that Sewai Teekarampore had no existence, and that his proceedings were consequently *malâ fide*. In respect of the Government revenue, he decided that the plaintiff was justified in paying it so long as he thought he had bought an estate, however small, and was entitled to recover it on proof that, at the time of his purchase, the land had been altogether diluviated.

Against this decision the Government defendant appeals, and should I think succeed. I do not agree with the Subordinate Judge either that the Collector knew, or ought to have known, of the non-existence of what he was putting up for sale, or that as a matter of fact Mouzah Sewai Teekarampore was non-existent at that time.

So far as the Collector was concerned, it appears that he issued the usual notification under Sections 5, 6, and 7 of Act XI of 1859, and the plaintiff has nowhere alleged that from returns made at the time the Collector was aware that he was advertising for sale an estate that had been long ago washed away by the river. The fact, if true, could easily have been proved, and the plaintiff would hardly have neglected such a very simple method of substantiating his case. The Subordinate Judge has made a charge for the plaintiff which he never ventured to make himself, and has presumed *mala fides* on the part of the Collector, without as it seems to me the smallest foundation.

The Mouzah Sewai Teekarampore was sold on the 27th of July 1863. The plaintiff purchaser is a mahajun, and presumably a shrewd man of business; at all events it is but reasonable to suppose that, before he purchased an estate liable to a yearly revenue of Rs. 1,196-4 he made the usual enquiries and satisfied himself that at least he was purchasing something at that time in existence. No doubt, Radhay Singh now denies that he made such enquiries, but the whole tenor of his conduct subsequent to the sale contradicts his allegation. He admits, moreover, in his deposition that the mehal in question had once belonged to his brother, which is against his present contention that he was an innocent trusting purchaser entirely ignorant

of the state of what he was buying, and careless as to making enquiry.

But the strongest reason for believing that the estate, much or little of it, was in existence at the time of plaintiff's purchase is to be found in Radhay Singh's own verified statement in the civil suit brought by him against Government as owner of the adjacent Khas Mehal Teekarampore in 1866. In that suit he claimed certain lands as accretions to his purchased estate of Sewai Teekarampore, alleging through his pleader, who was examined at the trial, that although a large portion of the lands of his purchased estate had been diluviated, there still remained some 50 or 60 beegahs to which the newly formed lands had accreted. This was in 1866, or three years after the auction-sale, and it is impossible to believe that he would have brought such a suit if there really had been at the time no nucleus of Sewai Teekarampore to which the disputed lands could have joined themselves. Any how the plaintiff committed himself to a verified written statement that in 1866 some of the lands which he had purchased in 1863 was still in existence. It has been contended for the respondent on this part of the case that the decision of this civil suit was the first intimation the plaintiff had that in 1863 Mouzah Teekarampore had no existence; but there is nothing in the record of the case to support this contention. The answer of the Collector to the plaintiff's claim was that the disputed land did not belong to the plaintiff's estate of Sewai Teekarampore, but did belong to the Government Khas Mehal of Teekarampore, and that the plaintiff's claim to it as an accretion (gungaburâr) to Sewai Teekarampore could not stand: the utmost said or inferred was that the mouzah did not exist in 1866, the date of the Collector's answer. This was a very different thing from admitting that, at the time of the sale to plaintiff, Mouzah Sewai Teekarampore had no existence, and that therefore the disputed land could not have accreted to it. The decision of the suit merely dismissed the plaintiff's suit, without going so far as I can see into any evidence as to whether Mouzah Sewai Teekarampore was or was not in existence in 1863. At the close of the judgment, there occur the words that the Collector had sold an estate which had no existence; but how the Subordinate Judge came to this opinion, which was opposed to both the plaintiff's and defendant's statements, does not appear. The point moreover was not in issue, the sole question for decision being whether

the disputed land was an accretion to Mouzah Sewai Teekarampore, or to Mouzah Teekarampore.

It is argued for the respondent that the Collector was by the sale law bound to convey an estate to the purchaser, and that, if no part of the land was in existence at the time of sale, no estate could have passed. For the reasons above given, I think that an estate—meaning by that, some land of Sewai Teekarampore—was in existence in July 1863, but in any case an estate would not necessarily mean land. Julkur, phulkur, and bunkur rights are all estates, and in this particular case, even supposing that in 1863 Mouzah Sewai Teekarampore had been entirely washed away, there would still have remained the right to possession of any alluvion that might subsequently have reappeared on the same site, and there would therefore, in accordance with the decision of the Privy Council in *Lopez v. Muddun Mohun Thakoor* and others, XIV W. R., 11, still have been an estate to sell.

I have little doubt myself that the plaintiff made the purchase as a matter of speculation. He bought a chur estate in the hope—a hope generally well-founded—that sooner or later alluvion would render his purchase a valuable one. The law of alluvion as it stood before the decision of the Privy Council above alluded to, gave all accretions to the estate to which they accreted, and the smallest nucleus might easily be the commencement of a very large and valuable property. Instead, however, of becoming the nucleus of a large estate, Mouzah Sewai Teekarampore has itself disappeared, and the plaintiff finds that he has made a bad bargain instead of a good one.

It was argued with much persistence for the respondent's pleader that, where both parties to a contract acted under a mistake, equity demanded that the purchaser should not be a loser; but to this it may be replied that the plaintiff was under no mistake, but that there was at the time of his purchase some land of Sewai Teekarampore in existence, and that the plaintiff was aware of the extent of his purchase.

Jackson, J.—I concur generally in this judgment.

By the Court.—The appeal must be allowed, and the plaintiff's suit dismissed with costs.

We make no order in regard to the revenue paid by the respondent for arrears subsequent

to the decision of the civil suit of 1866, but the Government of Bengal may not probably be disinclined under the circumstances to consider the justice of refunding the money so paid to the respondent.

The 31st May 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,

Judges.

Am-mooktears—Powers of Attorney—Deed of Sale.

Case No. 1274 of 1872.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 24th April 1872, affirming a decision of the Subordinate Judge of that district, dated the 22nd January 1872.

Mussamut Mohan Kooer (Defendant)

Appellant,

versus

Baboo Ajoodhya Doss (Plaintiff)

Respondent.

Baboo Kalee Kishen Sen for Appellant.

Baboos Bama Churn Banerjee and Taruck Nath Palit for Respondent.

Where a party resists liability for a deed of sale executed by his am-mooktear, it is necessary for the purchaser claiming under that deed to show that the mooktear had authority either by virtue of a general or special power of attorney to execute that deed, and to bind his principal by executing that deed.

Phear, J.—IN this case the title upon which the plaintiff came into Court was a deed of conditional sale executed by one Moosahib Lall, a mooktear of the defendant. The defendant has resisted the plaintiff's claim founded upon this deed by denying that she executed the deed, or that it was executed by any one having authority from her to execute it. The Lower Appellate Court has given the plaintiff a decree, and has remarked that "although it has been argued that Moosahib Lall was not

"empowered to act, yet it is clear that this contention is an after-thought and worthless, as the Mussamut in her written statement has plainly acknowledged Moosahib Lall as her am-mooktear."

It is a little difficult to understand what the Judge meant to convey by saying that "this contention is an after-thought;" for it appears upon the perusal of the defendant's written statement that it was put forward quite in the first part of this statement. The admission that Moosahib Lall was her am-mooktear, that is, general attorney, was not of itself inconsistent with her assertion that he had no authority from her to make this conditional sale. It seems that Moosahib Lall does act as mooktear for the defendant under some power of attorney; still it is incumbent upon the plaintiff before he can succeed in this case to show that Moosahib Lall, when he executed the deed on behalf of the defendant, had authority either by virtue of a general power of attorney or special power of attorney, to execute that deed and to bind the defendant by executing that deed.

It is a very remarkable thing that at the trial no one seems to have thought that it was necessary in order to make out the plaintiff's case that he should establish the mooktearnamah or power of attorney upon which he relied. As the record now stands, there is no evidence whatever of it. And if we dealt with the case, as it has been presented to us on special appeal, we ought to dismiss the suit altogether. But having regard to the circumstances of the case, we think on the whole that it will be right to give the plaintiff an opportunity of proving the mooktearnamah which he states constituted the authority to Moosahib Lall to execute the deed. The learned vakeel who has appeared for the plaintiff says that this mooktearnamah is identical with the mooktearnamah under which the deed of sale was registered. If so, a copy of it must exist in the Registration office, and by that it can be proved, no doubt, even if the original should not be forthcoming.

Under these circumstances, we reverse the decree of the Lower Court and remand the case for retrial with the direction that the Judge give the plaintiff and the defendant both an opportunity of adducing evidence upon the issue whether or not Moosahib Lall executed this deed by the authority of the defendant.

The plaintiff, respondent, must pay the appellant his costs in this Court.

The 31st May 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Sale of ancestral Property—Rights of Minors—
Liability of Auction-purchaser.*

Case No. 95 of 1872.

*Regular Appeal from a decision passed by
the Subordinate Judge of Tirhoot, dated
the 13th April 1871.*

Jungee Lall and another (Defendants)
Appellants,

versus

Sham Lall Misser and others (Plaintiffs)
Respondents.

*Baboo Chunder Madhub Ghose for
Appellants.*

*Mr. R. E. Twidale and Baboo Hem Chunder
Banerjee for Respondents.*

In a suit by S, in his own right and as well as on behalf of his minor brother, to cancel an execution-sale held in execution of an *ex parte* decree, to cancel the said decree and two bonds entered into by members of their family during plaintiffs' minority, and to recover possession of a share in the ancestral property which had been sold, it was found that the advances of money for which the bonds were executed were made without proper enquiries as to the necessity for the loan, and that the minors were not properly represented in the suit in which the *ex parte* decree was obtained :

Held that the mortgage bonds under such circumstances were invalid against the plaintiffs, and that it would be carrying presumption too far to say that a decree so obtained must be taken to be valid as against the minors.

Held that the auction-purchasers could not protect themselves by relying on the decree and execution-sale, after having received distinct notice that the mother of the plaintiffs challenged the validity of the whole of the proceedings.

Markby, J.—THIS was a suit brought by Sham Lall Misser, and by Soonder Lall Misser, minor, through his next friend and brother the first plaintiff, who has obtained the proper certificate for that purpose, to recover possession of a share in Mouzalls Nowshee, Dehdole, Kothlahee, Hurraimin, Puratapore, Luckmee, Bunwarajhoreeah, Chuck Dhadree, Manikpore, Dharumpore, Mojlas Peram Nath, Khurba, and Bissenpore Gohool, to cancel an auction-sale of that property held in execution of a decree on the 9th, 12th, and 13th August 1869, to cancel two bonds dated respectively 7th Srabun 1268 and 27th July 1862, and to cancel the above-mentioned decree dated the 14th January 1865.

The auction-purchasers and the parties in whose favor the bonds were executed, and who also obtained the decree, were made defendants in this suit.

The plaintiffs alleged that the share in question is their share in their portion of the ancestral property of the family ; that their father Mone Mohun Misser died in Srabun 1266 F., leaving the plaintiffs his minor sons ; that the plaintiffs remained under the protection of and were brought up by their mother ; that the second of the mortgage bonds above-mentioned was executed by the uncle of the plaintiffs, Hurdee Nath Misser as their guardian, and an *ex parte* decree obtained thereon ; that in execution of this decree, the property in suit was sold by auction, and purchased by the defendants who took possession in Assin 1277 F. The plaintiffs deny that their uncle had any right of guardianship during the lifetime of their mother, and assert that the bond executed by him on their behalf is invalid. They deny the facts stated in the bond, and that their father left any debts at his death. They say the income of their share was Rs. 2,500, and that there was no necessity for borrowing a single pice : so that their position ought to have greatly improved, whereas, in consequence of what has taken place, they have become beggars absolutely.

All the defendants, in effect, as we are informed, make the same allegations, namely, that the decrees of the 14th January 1865 is a conclusive answer to the plaintiff's claim ; that Fakeera Misser and Hurdee Nath Misser, who executed the two bonds, became guardians with the consent of the plaintiff's mother ; that the share in the family property to which the plaintiffs are entitled is incorrectly stated ; "that the bonds were executed for money found due to the defendant, "shop under bahee-khattah on account of payment of Collectorate revenue and supply of cash expenses in the course of banking transactions ;" and that the bonds were executed in good faith to meet legal necessities.

The defendants also allege that, owing to disputes in the family, there was much confusion in the collections of the estate, and that the lands lay fallow, whence arose the necessity to borrow, to pay revenue and meet the house expenses and expenses of litigation. They contend that at any rate the sale is good as to the shares of the adult members of the family, and lastly assert that Gopal Dutt Misser is really conducting this suit, and that he and the

plaintiffs and the other members of the family are still living jointly and that their dealings are joint.

The important questions raised by the issues are:—

(1). Whether the contraction of the loans was authorized and beneficial to the plaintiffs; and, if not so, whether the decree is binding on them?

(2). Whether the sale can be set aside against the defendants who are *bonâ fide* honest purchasers?

(3). What is the extent of the plaintiffs' share in the property?

This case and several other cases of a similar character were heard together by the Subordinate Judge, and taking that part of the judgment of the Subordinate Judge which applies to this case, we find that he holds that the real character of the transaction between Chummun Lall (the father of the defendants) and the family of the Missers was not, as the defendants alleged and contended, an ordinary banking transaction such as is well known and common in that part of the country, but simply a transaction by way of loan. The Subordinate Judge goes very carefully through the accounts and explains them very clearly, and shows that between the 3rd Assar 1267 and 16th Srabun 1269 (two years and one month) Rs. 2,572-2-6 was advanced for revenue, and Rs. 26,672-13 for other purposes; and he thinks these advances were made by Chummun Lall without making such enquiries as he ought to have made as to the necessity for the loan; that in fact no one thought of the interests of the minor at all, and merely joined the minors' names in the transaction because they were members of the family. He does not believe that there was any pressure on the property when the borrowing first commenced, or that the collections were stopped.

This case and the other similar cases went to the District Judge on appeal who also heard them together, and reversed the decision of the Subordinate Judge in all of them on the ground that no fraud being alleged the decree was conclusive. The cases then came before Mr. Justice Bayley and myself in special appeal. In one case, where the sale was in execution of a decree for costs, and where it appeared that the minors were properly represented in the suit in which that decree was passed, we thought that the judgment of the District Judge could be supported; but we thought, for reasons which we need not now repeat, that in the other

cases the fact that the sale was made in execution of a decree was not by itself conclusive, and therefore that further enquiry was necessary. Accordingly we called up all the other cases to be heard by us as regular appeals from the decision of the Subordinate Judge, and that is the way in which the present case now comes before us.

The defendants, appellants, who are both the decree-holders in the *ex parte* suit whose decree is sought to be set aside, and the auction-purchasers whose purchase is sought to be set aside, have not now made any really serious attempt to attack the conclusions at which (as above stated) the Subordinate Judge arrived. The evidence upon which these findings in a great measure proceed can scarcely be said to have been laid before us at all, and has only been very slightly alluded to in the course of the argument. We have, however, looked into the evidence, and we think that these conclusions are correct, and we also think that the Subordinate Judge was right in thinking that the mortgage bonds were under such circumstances invalid as against the plaintiffs in this suit.

The defendants have placed some reliance on the fact that the bond on which the *ex parte* decree was obtained was signed by Hurdee Nath, who had obtained a certificate under Act XL of 1858. But this does not really strengthen their case. It is not pretended that Hurdee Nath even obtained the sanction of the Court to this bond, and being in fact a mortgage it was, under the provisions of Section 18 of Act XL of 1858, invalid without this sanction.

The question then remains (and it is upon this point that the argument in this and the analogous appeals chiefly turns),—what is the effect of the *ex parte* decree? First, have those defendants who obtained that decree, and whom for convenience we will call the decree-holders, a right to say that this decree is conclusive as between them and the minors that the latter are liable? The decree-holders say that it is, and that no enquiry can now be made into the circumstances under which that decree was passed; that it must be presumed that the minor was properly represented, and that the decree was properly passed, it being ~~the duty of~~ the Court which passed that decree to see that it was so.

Now we do not, as a general rule, wish to impugn in any way the validity of this reasoning, and, no doubt, it was for the plaintiffs who denied the validity of that

decree to get rid of it by positive evidence that it was improperly obtained. But though they have shown to our satisfaction that the advances were not in fact for their benefit, they have not given any evidence to show how the decree was obtained, and the decree-holders contend that, until the decree is set aside, the prior question as to the liability of the minors cannot be gone into. What, however, the plaintiffs now assert, and what through their mother they have asserted ever since that decree was passed, is that they were not properly represented in that suit, and they contend that a decree against a minor is not conclusive, even *prima facie*, until, at least, it be shown that he was properly represented in the suit.

After some consideration, and having regard to the fact that one of these parties is still a minor, who ought not to suffer for the omissions of those who are conducting the suit, we determined, instead of deciding this case upon presumptions which must be unsatisfactory, to send for the record of this *ex parte* suit under the provisions of Section 138 of the Code; and having this record now before us, we feel no doubt whatever that the plaintiffs' allegation that they were not properly represented in that suit is true. Neither Gopal Misser, who is described in the plaint as guardian of the minors, nor any of the other defendants, appeared. No proof is offered that Gopal had obtained a certificate authorizing him to act as guardian to the minors, nor do we understand it to be now asserted that he was so authorized in fact. Nor is there any trace of his having been specially authorized to defend this suit on behalf of the minors. No vakeels were instructed by any of the defendants. Nothing like a proper enquiry was made, or evidence given as to the liability of the minors for the debts covered by these bonds. In fact, the decree was given upon merely formal evidence of the execution of the bond, and the proceedings appear to have been conducted without any regard whatever to the provisions of Section 3 of Act XL of 1858 or the interests of the minors. We think it would be carrying presumption too far to say that a decree so obtained must be taken to be valid as against the minors, and we therefore think that, notwithstanding this decree, the finding of the Subordinate Judge that the present plaintiffs are not liable for the money covered by these two bonds must be confirmed.

The auction-purchasers, however, contend that it does not follow because the decree

cannot be sustained by the decree-holders as against the minors that their purchase must, therefore, be set aside: and they rely on the decision reported in I B. L. R., App. Civil, page 56,* and the general principle that an honest purchaser acting with due care and diligence ought to be protected. It has been admitted in one of the analogous cases by the pleaders who also appear for the respondents in this case (and we think we are justified in accepting the admission) that this would be so, were it not for the notice given to the purchasers at the instance of the mother of the plaintiffs that she denied their liability and the validity of the *ex parte* decree on the ground that they were not properly represented in that suit. But it is contended that, having received that notice, the parties who intended to purchase at the auction-sale should have enquired further, and ascertained whether or no the minors were or were not properly represented in the suit which led to the decree, and in this contention we think they are right. It has been laid down by a decision of a Full Bench that there is no absolute protection to a *bonâ fide* purchaser at an execution-sale, but that each case must be determined according to its own circumstances (IX Weekly Reporter, 196): and looking to all the circumstances of this case, we consider that the auction-purchasers cannot protect themselves by simply relying on the *ex parte* decree and the execution-sale. Whatever might have been their position otherwise, they cannot do so after having received distinct notice that the mother of the plaintiffs as their guardian challenged the validity of the whole of these proceedings. The turning point, therefore, of this and several of the analogous cases is, as we indicated in our former judgment, the question whether or no this notice was given. We have fully considered this question, and have allowed some fresh documents to be filed in order to come to a more satisfactory determination upon it; and we agree with the Subordinate Judge in his finding that the defendants were fully aware before the sale that the liability of the minors was contested, and on the very ground that the minors were not properly represented in the former suit. Whether or no that was so was a fact that could have been very easily ascertained by a simple reference to the records of the Court in which the property was being sold, and in which the *ex parte* decree had been obtained.

* 10 W. R., 154.

And we think that it was at least the duty of the intending purchasers, after the notice given by the mother, to search these records. Had they done so, we now know what the result would have been, and we think the auction-purchasers cannot protect themselves by a decree which by reasonable diligence they might have discovered to be invalid.

As regards the form of the decree, the only complaint made is that the plaintiffs have not been directed to refund the whole of the purchase-money of the share which they recover. But the purchaser is not entitled to this. He has not shown that the whole purchase-money was carried to the assets of the joint estate, and that the plaintiffs have had the benefit of it. To some extent the Subordinate Judge thought the plaintiffs had had the benefit of it; and the plaintiffs have acquiesced in that decision. But nothing has been shown to us upon which we could find that as to the residue the plaintiffs derived any benefit whatever. And, therefore, adopting the rule laid down by the Full Bench in IX Weekly Reporter, 512, the plaintiffs cannot be compelled to refund any larger sum.

This appeal is therefore dismissed with costs.

The 31st May 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Execution-sale—Auction-purchaser—Notice.

Case No. 100 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 13th April 1871.

Ram Jewun Lall (Defendant) *Appellant,*
versus

Sham Lall Misser and others (Plaintiffs).
Respondents.

Mr. J. H. A. Branson and Baboo Boodh Sein Sing for Appellant.

Mr. R. E. Twidale for Respondents.

Auction-purchasers at a sale in execution of an *ex parte* decree are entitled to retain their purchase notwithstanding that the validity of the decree is contested, if notice of such contention was not communicated to them before the property was sold.

Markby, J.—THE facts of this case are with two exceptions analogous to those in

No. 95* and need not be fully stated. The first difference is that this *ex parte* decree on which the property was sold in this case was not obtained upon the bond, but in a second suit upon further advances not covered by the bond.

The record of this suit is also before us, and were it necessary to decide this point, we should come to the same conclusion as we come to in reference to the other *ex parte* decree, namely, that the proceedings were altogether invalid as against the minors.

But there is another and far more important difference between this and the other cases, which is that the notice by the mother that she contested the validity of this *ex parte* decree, and the liability of the minors for the debt upon which it was given, was not communicated to the auction-purchasers in this case. Therefore, although the decree cannot be maintained, the purchasers still contend that they are entitled to retain their purchase. The respondents have admitted that this being so, they cannot set aside the sale, and, upon the whole, we feel ourselves justified under the circumstances in accepting this admission.

The decree, therefore, of the Lower Court will be set aside and the suit dismissed. The defendant Ram Jewun Lall, who is the purchaser, will be entitled to his costs.

The 31st May 1873:

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Jurisdiction of Mofussil Court—Orders in Suits not pending—Orders in Panam.—Persons not Parties.

Cases Nos. 62 and 63 of 1873.

Miscellaneous Appeals from an order passed by the Judge of Midnapore, dated the 14th February 1873.

Ram Nidhee Koondoo and another (Judgment-debtors) *Appellants,*

versus

Ajoodhya Ram Khan (Decree-holder)
Respondent.

* See previous case.

Baboo Kalee Mohun Doss, Romesh Chunder Mitter, and Bhowanee Churn Dutt for Appellants.

The Advocate-General and Messrs. J. T. Woodroffe and R. T. Allan for Respondent.

A District Judge having dismissed a suit with costs, and an appeal having been preferred against his decree, it was brought to his notice that one of the plaintiffs was an indigent person who had been put forward in the suit, two others being the parties really interested. Finding this to be the fact, the Judge ordered that the names of these two parties should be added to the decree for costs:

Held that the Judge had no power to make such an order because the suit was no longer pending in his Court.

Mofussil Courts have no power to make an order *in penam* against persons who are not parties to a suit, such as the Judge made in this case.

Markby, J.—IN this case it has been established to the satisfaction of the District Judge upon an enquiry instituted by him that one Ram Nidhee Koondoo and Bykunt Nath Koondoo, being desirous of entering into a transaction for the purpose of assisting certain persons called the "Bhooyas" in establishing their claim to certain landed property in Midnapore, agreed that they should receive, as a consideration for so doing, the half of any property that might be recovered in the suit; and in order to carry out this arrangement, purchased from the Bhooyas at a nominal sum one-half of their interest in this property; but the Koondos, instead of taking a conveyance in their own names, and joining with the Bhooyas as plaintiffs in the suit, took a conveyance in the name of one Shama Soonduree, an indigent member of their family and dependent upon them for support: and they caused the suit to be brought in her name and that of the Bhooyas jointly.

The District Judge has found that Shama Soonduree was thus put forward by the Koondos in order to save themselves from having to pay the costs of the suits which were to be brought to establish the claim, in case they should be unsuccessful. The District Judge is further of opinion that Ram Nidhee Koondoo and Bykunt Nath Koondoo are the real plaintiffs in the suit, though acting in the name of Shama Soonduree.

Upon these facts being established, the District Judge directed that the names of Ram Nidhee Koondoo and Bykunt Nath Koondoo should be added to the decree for costs, which the defendant had obtained in the two suits brought in the name of the Bhooyas and Shama Soonduree Dossee under the above arrangement, and which the District Judge had dismissed.

Having had the depositions taken by the Judge read to us, and having heard the arguments thereon, we have no reason whatever to doubt that his conclusions of fact are fully justified by the evidence.

The question for consideration is whether the District Judge had power to make such an order as was made by him upon these facts being brought to his notice.

Whether or no, if the application had been made whilst the suit was still pending in the District Judge's Court, the Koondos could have been made liable in the decree for costs, we need not now determine. No doubt, the District Judge had facts before him which showed that Shama Soonduree's ownership was a mere fiction; that in fact, as put by Mr. Woodroffe, she was no more a reality than the John Doe or Richard Roe in the old fashioned English action of ejectment, and possibly it might have been considered that, in making the Koondos by name liable for costs, he was in reality only drawing up the decree in accordance with the real facts of the case.

But, however desirous we may be to support the District Judge in checking an undoubted fraud, we feel unable to say that he had power to make such an order in the present case, because when that order was made the suit was no longer pending in his Court. The record had left his Court and had been brought up to this Court upon appeal against the decree dismissing the suit. Even, therefore, if the District Judge had power to draw up a decree making the Koondos liable for costs whilst the suit was still pending in his Court, it was clearly impossible for him to do so after it had been carried out of his Court into the Court of appeal.

It was, however, contended that this was not really what the Judge intended to do; that this order should be looked upon, not as a decree or as part of a decree against parties to a suit, but as an order made *in penam* against the Koondos, similar to the orders which have been sometimes made in the High Court on the original side against persons not parties to the suit to pay the costs

of a suit which they have promoted or instigated.

It is not necessary for us on this occasion to examine accurately upon what grounds such orders are made by this Court. The general principle cannot be denied that Courts of Justice have only power to deal with persons brought before them by regular process of law, and they have not power, otherwise than by such process, to summon before them any persons they may choose to answer for their misconduct. There are, no doubt, exceptions to this principle; such as the power to punish what is called "contempt of Court;" and it has been considered that this Court on its original side has very wide powers in this respect. But we do not feel justified in saying that the Civil Courts of the mofussil have these wide and general powers. If one such Court has them, all must have them; and we think it must not be too hastily assumed that Courts of such various grades have all precisely the same wide and general powers as are possessed by this Court. No authority has been produced before us for holding that the mofussil Courts possess power to make an order *in pœnam* against persons who are not parties to a suit, such as the Judge has made in this case; and no instance has been shown in which such powers have been exercised. Special powers to punish by fine not exceeding Rs. 200 any person guilty of contempt *in open Court*, or of undue arrogation of the authority of the Court, or of illegal execution of judicial authority in his own cause, were conferred upon these Courts at their foundation (Regulation IV of 1793 Section 21), and these powers have been since slightly extended by the Legislature. But no attempt was made to bring this case within any legislative provision.

It was also contended for the respondent that no appeal lies to this Court against such an order; or that if it lies at all, it can only be heard as part of the general appeal which has been preferred to this Court against the decision of the suit by the District Judge. But whether an appeal lies or no, the matter having been fully discussed, and the order complained of having been made in a suit of which the record is now in this Court, we have no doubt that we ought to set it aside. But we do not think we ought to allow any costs; for though Ram Nidhee Koondoo and Bykunt Nath Koondoo have succeeded in setting the order aside, we cannot too strongly express our disapprobation of their conduct.

The 2nd June 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Registration of Transfers—Cause of Action.

Case No. 1201 of 1872.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 11th June 1872, reversing a decision of the Moonsiff of Mungulcote, dated the 29th January 1872.

Radhika Pershad Shadhoo (Plaintiff)
Appellant,

versus

Gooroo Prosunno Roy (Defendant)
Respondent.

Baboo Sreenath Doss for Appellant.

Baboo Bama Churn Banerjee for Respondent.

Where a zemindar refuses to register a transfer on the application of a purchaser, the latter's cause of action arises from the time of such refusal, and not from the time when his title accrued by his purchase.

Couch, C.J.—THE Judge is wrong in holding that the period for bringing the suit was to be calculated from the time when the plaintiff's title accrued by his purchase. The time is to be calculated from when the cause of action arose, and that would arise when the plaintiff first applied to have his transfer registered, and the zemindar refused to do so. It is impossible upon the proceedings for us to say when it was. The case must be remanded to the Lower Appellate Court. The costs will follow the result.

The 2nd June 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Widow's Maintenance—Liability of Family Estate.

Case No. 1140 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Cuttack, dated the 1st May 1872, affirming a decision of the Subordinate Judge of that district, dated the 11th October 1871.

Juggernath Sawunt (Plaintiff) *Appellant*,

versus

Maharanees Odhiranees Narain Koomaree and others (Defendants) *Respondents*.

Baboo Romesh Chunder Mitter for *Appellant*.

The Advocate-General and Baboo Mohesh Chunder Chowdhry for *Respondents*.

Whatever may be the rights of the younger members of a family, where the estate is inherited by the eldest member, until the maintenance of the widow of one of the members has become a specific charge upon the property, it cannot be a charge upon the estate in the hands of a *bonâ fide* purchaser for consideration.

Couch, C.J. — THE appeal must be dismissed. The plaintiff does not appear to be entitled, either by virtue of the decree or by the custom relied upon in his plaint, to maintenance out of the estate which is in the hands of the defendant. Whether, supposing the plaintiff is entitled to maintenance, it would be a charge upon the estate in the hands of the defendant, the purchaser, need not be decided in this case, but we may say that whatever may be the rights of the younger members of a family where the estate is one of this description and is inherited by the eldest member, that until the maintenance has become a specific charge upon the property, which it might by a decree of a Court making provision for the payment of the maintenance and declaring that a part of the property should be a security for it, or by a contract between the parties charging the property with a certain sum for maintenance, we do not see how it can be a charge upon the estate in the hands of

a *bonâ fide* purchaser for consideration. We concur in the reasons which Mr. Justice Phear gave in the case which has been quoted respecting a widow's maintenance. They would apply as strongly to the present case. We think that in the absence of any authority to the contrary, if it were necessary for us to decide the question, we should hold that the maintenance is not a charge upon the estate in the hands of the defendant, but, as we have already said, the plaintiff has not shown that he has any right to maintenance.

The appeal must be dismissed with costs.

The 2nd June 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Joint Estate—Ejectment—Right of Action—Co-sharer's Rights.

Case No. 1029 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 28th March 1872, modifying a decision of the Moonsiff of Nurrail, dated the 1st December 1870.

Hulodhur Sen and others (Defendants) *Appellants*,

versus

Gooroo Doss Roy (Plaintiff) *Respondent*.

Baboos Mohinee Mohun Roy and Rash Beharee Ghose for *Appellants*.

Baboo Ashootosh Dhur for *Respondent*.

A suit for ejectment, brought in plaintiff's own right and on behalf of his co-sharer without authority from such co-sharer, cannot be entertained.

The right of a sharer in a joint estate is a right of common enjoyment of the lands and premises together with the tenants of the co-sharers, in like manner as the co-sharers themselves would have it.

Jackson, J. — THE circumstances of this case are peculiar. The plaintiff, Gooroo Doss Roy, sued in his own right and as attorney for and on behalf of his co-sharer Ram Runginee Dossee to eject from the premises mentioned in the plaint the defendants called the Sens. He alleged that his right to dispossess them arose in consequence of an istafa filed, it is not clear

under what circumstances, in the Court of the Deputy Collector of Nurrail in the year 1270. At that time the zemindar's rights were enjoyed by the putneedar, who subsequently relinquished the tenure leaving the zemindar in khas possession. A plaint so presented ought not to have been received, because there is no provision for a person's suing otherwise than in person, or by his vakeel or authorized agent; but Ram Runginee, after the commencement of the suit, appeared and wholly denied that she had authorized Gooroo Doss to bring any suit in her name; and this turning out to be so, her name was expunged from the record as plaintiff, and she was afterwards made a defendant.

The defendants, who are appellants in this case, claim part of the land quite independently of Gooroo Doss in right of a certain jumma belonging to them. As to the land that formed a part of the plaintiff's zemindaree, they alleged that they held it under a valid tenure obtained by them in the name of Kala Chand Sircar and Raj Chunder Dey. They admitted that, as they were not on good terms with Gooroo Doss Roy, they could not hope to obtain the holding in their own name, and they therefore employed those two persons as their furzees to get the tenure granted to them. They therefore urged that those two persons, Kala Chand Sircar and Raj Chunder Dey, having no interest in the holding, were not competent to make an istafa, and such istafa was not binding on them.

The Moonsiff framed a number of issues in the case and went into the facts and the questions of law arising out of them, and finally dismissed the suit of the plaintiff.

On appeal, the Subordinate Judge, holding that "although Gooroo Doss Roy was not the owner of the entire land of which the defendants were shown to be trespassers, yet when his undivided share covered every inch of it, he had a right to expel the trespassers from the entire land, especially when Ram Runginee did not urge that the defendants should be allowed to retain possession of at least her share in the property," declared that the plaintiff Gooroo Doss Roy was entitled to turn out the defendants and get khas possession of the land, including the share of Ram Runginee, but without prejudice to her right, and to demolish the huts erected thereon by the defendants. The suit, as originally framed by Gooroo Doss Roy, was very different from the case on which he has been allowed to

obtain a decree in the Lower Appellate Court, for if the suit had been really brought by the whole of the co-sharers, or by one person entitled to the 16 annas of the estate, and the defendants had no valid right to occupy the lands, the case would have been perfectly simple. It is an entirely different state of things when we find that plaintiff is only one of two co-sharers, and the defendants are holding the land with the express sanction and acquiescence of the other co-sharer; and if under these circumstances, the Moonsiff had dismissed the suit, and that order would have been affirmed by the Court of appeal, we do not think we should have been disposed to interfere. But the case has gone to trial upon issues framed upon the fact that plaintiff is one co-sharer, and Ram Runginee the other. The defendants' conduct, it must be remembered, has not been straightforward, and whatever Ram Runginee's inclination in connection with the land now may be, we can see that the defendants' possession which originated in a deception was less due to any merits of theirs than to the discord between the co-sharers. We do not think it would be right now to dismiss the suit on the technical ground just mentioned, but at the same time it is clear that Gooroo Doss Roy is not entitled in this case to anything more than his strict rights as co-sharer. According to several previous decisions of this Court, that right in such a case is this, *viz.*, a right of common enjoyment of the lands and premises, together with the tenants of the co-sharers, in like manner as the co-sharers themselves would have it. We think, therefore, that the decrees of both the Courts below must be set aside, and that instead of those decrees the plaintiff should be declared entitled to joint possession to the extent of his 12-anna share (for there can be no doubt that such is the extent of his share) of the lands and premises lying to the north of the line marked I—1 in the map filed in suit No. 926 of 1861, Issur Chunder Doss, plaintiff, and Kala Chand Sircar, defendant, but not so as to entitle plaintiff to destroy any buildings or walls erected upon such land. In respect of the lands to the south of that line, the plaintiff's suit is wholly dismissed. Each party to these proceedings—*viz.*, the plaintiff Gooroo Doss Roy and the defendants who are before us—will bear his own costs. If Ram Runginee had been before us, we should be inclined to say that her costs ought to have been borne by the plaintiff, but as she is not here we do not think it necessary to say anything on that point.

The 3rd June 1873.

Present :

The Hon'ble W. Markby and F. A. Glover,
Judges.

Rent—Interest—Act VIII (B.C.) of 1869.

Case No. 1409 of 1872.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 3rd July 1872, reversing a decision of the Moonsiff of Namal, dated the 9th April 1872.

Radhika Prosunno Chunder and another
(Plaintiffs) *Appellants,*

versus

Urjoon Majhee and others (Defendants)
Respondents.

Baboos Kalee Mohun Doss and Bhownanee Churn Dutt for Appellants.

Baboo Doorga Mohun Doss for Respondents.

S. 21 of Act VIII (B.C.) of 1869 does not impose upon the tenant an absolute obligation to pay 12 per cent. interest when the rent is not paid.

Markby, J.—THE first two points that were taken by Baboo Kalee Mohun Doss turn simply upon the evidence, and therefore we cannot deal with them in special appeal. As to the construction of the amulnamah, it appears to us that the Judge has put a reasonable construction upon it.

The only point that requires any consideration is as to the construction of Section 21 of Act VIII (B. C.) of 1869. The words of that Section being precisely the same as those of Section 20 of the former Act, no doubt the same construction must be put upon it unless from any other part of the Act we can assume that there was any other intention of the Legislature. Certainly it does appear from Section 44 of the new Act that it is the duty of a tenant, when the zemindar refuses to receive the amount tendered by him, to pay it into the Court, otherwise he renders himself liable to very heavy damages; but still we cannot come to the conclusion that the Legislature did for that reason intend, when they used the very same words as they used in the former Act, to impose upon the tenant to pay as an absolute obligation 12 per cent.

interest when the rent was not paid. That was held not to be so under the former Act, and we think we ought to hold that it is not so under the present. We think, therefore, that it was in the discretion of the Court to decide whether or not interest should be allowed.

The special appeal will be dismissed with costs.

The 3rd June 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Security—Mortgage—Rights of Mortgagee.

Case No. 1474 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 4th June 1872, reversing a decision of the Moonsiff of that district, dated the 5th December 1871.

Achumbit Singh (Defendant) *Appellant,*

versus

Kesho Lall (Plaintiff) *Respondent.*

Moonshee Mahomed Yusoof for Appellant.

Messrs. R. T. Allan, R. E. Twidale, and C. Gregory for Respondent.

Defendant advanced a sum of money to R and T, who granted him, as security for repayment, an ijara lease of a mouzah (representing that they were entitled to 16 annas), in which lease a jumma was reserved, a portion whereof was to be applied to the discharge of interest to the defendant and a small sum to go to the mortgagor's as *huq-i-ijara*. After execution of the ijara, the defendant was dispossessed of 8 annas by a third party who claimed to be a sharer, and he had to sue and obtain a partition of the remaining 8 annas, which he retained for what it was worth as security. Plaintiffs bought the mortgagor's share, and now sue for the *huq-i-ijara* originally reserved:

Held that the mortgagors could not claim any benefit under the ijara lease until all the benefits which it pretended to secure to the defendant were realized by him.

Phear, J.—We must say that we find it somewhat difficult to realize to ourselves the ground upon which the Lower Appellate Court gave a decree in favor of the plaintiff.

The matter seems to be a very simple one indeed. The defendant advanced a certain sum of money, Rs. 1,358, to Ram Churn and Toolsee Singh; and they in order to secure the repayment of this loan, being themselves mukurureedars of a certain mouzah, granted to him an ijara lease of this

mouzah, representing that they were entitled to 16 annas; in which lease a jumma of Rs. 275 was reserved for the first year, a portion of which was to be paid to the superior proprietors, and Rs. 142 was to be applied to the discharge of the interest due to the defendant; Rs. 2 was to go to the mortgagors as *hug-i-ijara*. After the first year, this latter item was to be raised to a sum of Rs. 77, thus making the jumma subsequently payable in respect of this ijara lease, Rs. 350.

After this ijara had been executed, the defendant was unable to obtain the whole 16 annas of the pledged property, or rather was dispossessed of 8 annas of it by a person who claimed to be a shareholder of Ram Churn and Toolsee Singh; and eventually he was obliged to bring a suit of the nature of a partition suit, in which Ram Churn and Toolsee Singh's share, which was 8 annas, was divided off from the rest; and the present defendant retains that as covered by the ijara lease for as much as it is worth as a security for his loan. The present plaintiffs bought the mortgagors' share. They now bring this suit upon the footing of the ijara lease claiming to have half the amount of the Rs. 77, that is, the amount of *hug-i-ijara* which was originally reserved, diminished in the proportion in which the subject of the ijara lease was diminished, as the result of the suit. In fact, it appears to us, that this claim of the plaintiffs is a claim on the part of the mortgagors to recover half the benefit reserved to them under the original ijara lease, on the ground that in consequence of the events which have occurred, the mortgagors having obtained only half the subject which was intended for their security, they would only ask for half the sum which was reserved to them. But it appears to us quite clear that the mortgagors cannot, under the circumstances that we have mentioned, claim any benefit whatever under the ijara lease until *all* the benefits which the original ijara lease granted by them, pretended to secure to the defendant are realized by him. Of course the main and the only benefit which it was intended that he should realize was the perception of this interest to the extent of Rs. 142. When he has realized that out of the diminished subject which forms his security, then possibly the mortgagors may come to claim the benefit, or a portion of the benefit, which was reserved to them under the ijara. As it seems to us, however, that before that event occurs they have no right at all. It is not shown to us

that, if the Rs. 142 be paid to the defendant and the rent reserved to the superior proprietor be deducted, there will remain half of Rs. 77, or any amount whatever which so might be due to the plaintiff.

This being so, it is very clear to us that the plaintiff has not made out any ground upon which he can succeed in this suit. We think that on the facts which the Lower Appellate Court has presented to us, the plaintiff ought not to succeed.

It seems to us that the special appeal must be upheld and the plaintiff's suit dismissed, and the defendant must have his costs in all the Courts.

The 3rd June 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Rights of Occupancy—Ejectment.

Case No. 1464 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 10th June 1872, affirming a decision of the Moonsiff of Nowabad, dated the 28th August 1871.

Mutty Soonur (Defendant) *Appellant,*

versus

Gundur Soonur and another (Plaintiffs)
Respondents.

Baboo Doorga Doss Dutt for Appellant.

Baboo Boodh Sen Singh for Respondents.

In a suit for ejectment it appeared that plaintiff had purchased the house which stood upon the plot in dispute thirteen years prior to the institution of the suit; that he had occupied it for four years and then left the district for business purposes, paying no rent for the 7 or 8 years of his absence, during which the zemindar put the defendant in possession and took rent from him:

Held that, even if plaintiff had a right when he went away to occupy the land if he chose to do so, as he did not do so he had no right on his return to eject the defendant.

Phear, J.—We think that the Courts below have considerably misapprehended this case. It appears that there really was no conflict between the parties as to the facts. According to the plaintiff's own witnesses, the plaintiff purchased the house which stood upon the plot in question some

thirteen years ago, occupied it for four years, and then went to Hazareebagh for business purposes. From that time until the time of bringing this suit, a period of seven or eight years at least, he neither returned to the place nor paid rent to the zemindar. Under these circumstances, in the meanwhile, the zemindar put the defendant into possession and took rent from him. So that at the time when the plaintiff brought this suit, the defendant was occupying the land in question, living there and paying rent to the zemindar. Clearly, the plaintiff can only succeed in this suit which is brought to oust the defendant by showing his own superior right. The only right upon which he relies is an ordinary right of occupancy which he asserts he had gained at the time when he left for Hazareebagh, by reason of lapse of the time during which he and his predecessor had occupied the house. We are not concerned to enquire now whether the facts of occupation in the way in which he alleged them were of such a character as would be sufficient to give him the right of occupation upon which he sues. We will assume for the moment that, when he went off to Hazareebagh, he had a right to occupy the land if he chose to do so. He did not do so, because by no possible leniency of construction can we make the absence at Hazareebagh for six, or seven, or eight years without payment of rent into an occupation of the land in question during that time. Possibly, we will repeat, he had a right to occupy the land when he went away, supposing he chose to do so. But clearly on these facts he did not choose to do so. And we think that after his absence under the circumstances that we have mentioned he had no right under the color of the mere right to occupy, which he formerly possessed, to turn out the defendant who certainly, irrespective of the plaintiff's right, was most rightly and completely in possession and occupation of the land. The Lower Courts are of opinion that the right of occupation was proved, and that this right of occupation gave the plaintiff a title to recover in this suit. In this latter particular we think they are certainly wrong under the circumstances of this case.

On the facts, therefore, which we understand to have been found by the Lower Appellate Court in favor of the plaintiff, we think that the plaintiff's suit ought to have been dismissed: and accordingly we think that this appeal must be upheld, the plaintiff's suit dismissed, and the defendant must have his costs in all the Courts.

The 3rd June 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Execution-sale—Act VIII (B.C.) of 1869—Postponement.

Case No. 77 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Nuddea, dated the 6th February 1873.

Janokeenath Mookerjee (Decree-holder)
Appellant,

versus

Radha Mohun Chatterjee and another
(Judgment-debtors) *Respondents.*

Baboo Mohinee Mohun Roy and Umbika Churn Banerjee for Appellant.

No one for Respondents.

A sale in execution of a decree under Act VIII (B.C.) of 1869 can be postponed at the discretion of the Court only when the postponement is shown to promise benefit to the judgment-debtor, i.e., that it will put him in a position to satisfy the demand, or when an immediate sale would be likely to entail injury to him, while a postponement would cause no serious prejudice to the decree-holder.

Jackson, J.—THE question raised in this appeal relates to the postponement by the Subordinate Judge of the sale of a durputnee talook for arrears of rent for which the plaintiff recovered a decree on the 28th March 1872. It appears that the decree-holder obtained an order for the sale of the tenure, but that, upon the application of the judgment-debtor, the sale had been from time to time postponed. The order of postponement which occasioned this appeal is dated the 6th February last, and since then it appears that a further postponement of two months has been allowed. The appellant contends in the first place that, under the provisions of Act VIII (B.C.) of 1869, the Court executing the decree has no discretion in respect of the postponement of the sale; and secondly, that even if there be a discretion, it must be exercised on some reasonable ground, but that no such ground is disclosed in the present instance. It is not necessary for us in the present case to determine absolutely whether the Court executing a

decree under the Act referred to is debarred from exercising discretion in such matters. It is sufficient for us to say that, in the present instance, the sale has been improperly postponed. It is only right to grant such indulgence when the granting of it is shown to be beneficial to the judgment-debtor; when he satisfies the Court that by the postponement he will be in a position to satisfy the demand; or when the immediate sale is likely to be attended with ruinous or unduly injurious consequences to the judgment-debtor while the postponement would cause no serious prejudice to the decree-holder. In such cases, no doubt, the Court may, in its discretion, grant a postponement, but the present is not one of those cases. Here, on the contrary, the judgment-debtor was drifting into greater and greater embarrassment, and the longer the sale was put off the greater would be the judgment-debtor's difficulty in paying the money and the less the decree-holder's likelihood of recovering it. The order of the Subordinate Judge is set aside, and he is directed to carry out the sale immediately.

The 4th June 1873.

Presept:

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

Decree—Splitting into Shares—Satisfaction.

Case No. 72 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 17th December 1872, affirming an order of the Moonsiff of that district, dated the 16th May 1872.

Bhyrubnath Shaha and another (Judgment-debtors) *Appellants,*

versus

Kunhya Lall Roy and others (Decree-holders)
Respondents:

Baboo Romesh Chunder Mitter for
Appellants.

Baboo Mohinee Mohun Roy for
Respondents.

Payments by a judgment-debtor in satisfaction of a decree which is afterwards split up into shares, if made

through the Court and while the decree is entire, ought to be taken into account and set off as in satisfaction of the whole decree.

Kemp, J.—THE only question in this case as now before us is whether the Court below is right or wrong in holding that any payments made by the judgment-debtors in satisfaction of the decree of 1836, such payments having been made in 1855, can be taken into account or not. It appears, as far as we can ascertain from the argument that has been placed before us, that the decree was passed in 1836 in favor of Mussamut Rayunnissa Khatoon for possession and wassilat. After her death, it is not disputed, that Saadut Ali was substituted for the original decree-holder Rayunnissa Khatoon in 1859. Many years after the decree was passed, Khajah Abdool Gunny, who has since parted with his interest to the opposite party, the respondents, alleged that under an agreement with Rayunnissa Khatoon, he was entitled to a 7-anna share in the decree. His application was in the first instance rejected; he then sued and got a decree in 1863, so that the decree now stands 9 annas in the name of Saadut Ali, and 7 annas in the names of the respondents, the representatives of Abdool Gunny. In 1869, an account was gone into with reference to wassilat (the decree awarding mesne profits) in respect of the 7 annas; but that was a mere matter of account. The present appellants before us do not appear to have opposed it in any way or to have appeared at all at the time.

The Court below is of opinion that the payments alleged to have been made in 1855 by the judgment-debtors cannot be taken into account. This we think is wrong, for, at the time these payments were made, the decree was an entire one and had not been split up in any way.

We therefore find, reversing the decision of the Judge, that these payments, which were made through the Court and certified, the amount of which however is in dispute, ought to be taken into account and set off as in satisfaction against the whole decree.

Any balance due after such sums shall have been set off against the whole decree will be recovered by all the judgment-creditors including Saadut Ali Khan. Saadut Ali, or his heirs, will be liable to the special respondents for seven-sixteenths of any sum which the judgment-debtors may be found on enquiry to have paid in satisfaction of the decree.

The 4th June 1873.

Present :

The Hon'ble Louis S. Jackson and
Dwarkanath Mitter, *Judges.*

Right of Occupancy—Powers of Jotedar.

Case No. 1224 of 1872.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 13th May 1872, modifying a decision of the Additional Moonsiff of that district, dated the 13th May 1871.

Mohanund Banerjee (Defendant) *Appellant,*

versus

Shushee Shekhur Chatterjee (Plaintiff)
Respondent.

Baboo Bungshee Dhur Sen for Appellant.

*Baboo Anund Chunder Ghosal for
Respondent.*

The heir of a person with a restricted right of occupancy, though not competent to transfer that right out and out by sale, may make for life such arrangements as he thinks fit for the cultivation and management of the tenure.

Jackson, J.—It is clear that the decision of the Lower Appellate Court in this case cannot be sustained. The Judge, finding that Panchoo enjoyed a right of occupancy in this holding and that he died leaving his widow as his heir, goes on to say :—"The zemindar cannot take khas possession, but neither can defendant obtain possession by reason of his purchase. The only person who can take possession, and who is responsible to the zemindar for the rent is Panchoo's heir, at present represented by his wife," which means that Panchoo's wife is his heir. No doubt, the heir of Panchoo would not be competent to transfer out and out by sale the restricted right of occupancy which her husband and she as heir to that husband enjoyed ; but there is no reason why she should not during and for her life make such arrangements for the cultivation of the jote and its management as she thinks fit. She has done so, and she asserts her right. Under these circumstances, the plaintiff not being entitled to khas possession, all that the Judge below had to do was to order the dismissal of the suit. The judgment of the Judge, therefore, as well as that of the Moonsiff, must be set aside, and the plaintiff's suit dismissed with costs.

The 4th June 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Regulation VIII of 1819—Service of Notice.

Case No. 1574 of 1872.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 16th August 1872, affirming a decision of the Subordinate Judge of that district, dated the 14th June 1872.

Hunooman Doss alias Nonnah Baboo
(Defendant) *Appellant,*

versus

Bipro Churn Roy (Plaintiff) *Respondent.*

*Baboos Sreenath Doss and Greeju Sunkur
Mojoomdar for Appellant.*

*Baboo Bhugobutty Churn Ghose for
Respondent.*

It was held to be a far more exact compliance with the spirit of Regulation VIII of 1819 to serve the notice which it enjoins at the place in which the defendant's gomastah was transacting and did habitually transact business, than at the cutcherry which had not been in use.

Jackson, J.—THE points for decision stated by the Judge in the case are,—firstly, whether the notice was served at the cutcherry, or at the principal town or village upon the land of the defaulter; and, secondly, if so, whether the service of the notice was properly attested or not as provided by Section 8 Regulation VIII of 1819. On the first of these points the Judge says :—"The evidence clearly shows that the notice was affixed, not at the cutcherry of the defaulter, but at the house of Nobin Pal situated at some distance from the defaulter's cutcherry. No sufficient reason" he goes on "has been shown why the notice should not have been published at the mal cutcherry." He says :—"It is urged on behalf of the appellant that there is evidence to show that the business of the plaintiff was sometimes transacted at the house of Nobin Pal, and that even if the notice was not regularly published, plaintiff is not entitled to succeed unless he can show that he has been injured in some way by the irregularity."

Now this seems to us to be scarcely a fair view of the evidence on this point. The evidence of Nobin Pal, who was the gomastah of the defaulter, and who was himself a witness in this cause, was to the effect that he was a resident of the village in which the cutcherry was, that the cutcherry was in a ruinous state, and he used to transact business in his own house except when the zemindar was expected, and that even then the zemindar would frequently transact business at his (Nobin Pal's) house. Now, considering what a cutcherry is in a village in Bengal, considering what the object of the Regulation was, viz., to insure the publication of the notice to the defaulter or to his manager, it appears to us that it would be and it was an infinitely more exact compliance with the spirit of the law to serve the notice at the place in which the defaulter's gomastah was transacting, and did habitually transact business, than to serve it at an empty and ruinous building. If it had appeared that the building denominated the cutcherry had been in daily use, that the records and the papers of the mehal were there, and that the servants of the defaulter were on that spot transacting their business there, then it may be admitted that the house of the gomastah for the time being could not be properly considered a place where the notice might be served under the Regulation; but under the circumstances of the case, we think the house where the gomastah resided may fairly be regarded as the cutcherry for the time being. We do not find that the Lower Appellate Court disbelieved the evidence of Nobin Pal, or indeed that the Subordinate Judge disbelieved him although he comments on the difference in tone between the evidence given by this man on two occasions; once when he was in service, and again after he was dismissed. We have already said it does not appear that he is disbelieved, nor is there any reason why he should be disbelieved.

Then as to the attestation to the service of the notice, it appears to us that this is a point entirely immaterial. The mode of service and the attestation of particular residents required to be produced by the serving peon are matters separated by the Regulation itself from the forms for the observance of which the zemindar is answerable, and obviously the zemindar could not be answerable for the observance of such rules on the part of the peon who was not his subordinate. Besides, the strict observance of these rules would be material only when the service of the notice is not admitted or proved, which is not the case here. In this case the notice unquestionably

was served, the only dispute being whether it was served in the proper place. That being so, we think there was no sufficient ground for setting aside the sale in this case. The judgments of both the Lower Courts are reversed, and the plaintiff's suit dismissed with costs.

The 16th May 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Lawrence Peel.

Execution—Alienation of Attached Property—Striking off of Attachments.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Puddomonee Dossee and another

versus

Roy Muthooranath Chowdhry and others.

The prohibition against alienation which is involved in an attachment, avoids the conveyance only as against the execution-creditor, or some person entitled to claim under him.

A conveyance executed by the judgment-debtor after one attachment has been permanently struck off and before a new attachment is issued is valid.

The striking an execution proceeding off the file in India is an act which may admit of different interpretations according to the circumstances; but when a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained.

THE suit out of which this appeal has arisen was brought by the late Rass Monee Dossee, and her appeal has been continued by two ladies who appear to be her heirs and representatives.

The suit was brought for the purpose of cancelling a bhaug pottah set up by the defendants, the Chowdrys, and recovering from them the possession of a parcel of land upon which a bazaar had been built, with mesne profits, the title on which Rass Monee Dossee sued being that of a purchaser at an execution sale.

That was the object of the suit as stated in the plaint. When the Chowdry ~~put in~~ their answer, they not only relied upon the bhaug pottah, but also set up the second, which we may call the mooroosoe pottah;

* From the judgment of Raikes and Pundit, JJ., in Regular Appeal No. 299 of 1860, decided 30th May 1863.

and the validity of that being called in question by the replication, one of the issues settled in the suit put in issue the validity of both pottahs, being in terms whether they had been granted *bonâ fide* to the defendants, or whether they were collusive or illegal.

The title of Rass Monee Dossee to the right, title, and interest of the execution debtors, a joint family which may be described as "the Sirkars," is not disputed; the only question is what were the extent and nature of their interest in the property sold at the date of the sale. It is necessary, however, in order to see how this question arose between the parties, to recapitulate, as shortly as may be, the facts of the case.

The proceedings go back as far as the year 1830.

In August of that year one Bhoyrub Sein recovered a money decree for an inconsiderable sum against the Sirkars. In execution of that decree, the land in question was attached on the 27th February 1832, and the usual proclamation of attachment was issued on that occasion. Bhoyrub Sein died, leaving (as it is said, and their Lordships will assume correctly said) only minor heirs.

Nothing further was done between the date of this attachment in 1832 and the year 1844, when the case in execution was struck off the file, the judgment being still unsatisfied. It appears that within one year after that was done Rass Monee Dossee became mortgagee of the land under instruments executed by the Sirkars. There were two mortgages for Rs. 500 each. They seem to have been ordinary Bengal mortgages operating as mere pledges of the land; and she subsequently instituted proceedings to enforce those securities. Pending her suits, and apparently before she obtained a decree, the heirs of Bhoyrub Sein took fresh proceedings to enforce their judgment. A new attachment issued in June 1848. The order for sale was made on the 30th March 1849, and Rass Monee Dossee became the purchaser for a small sum, Rs. 1,400, of the property. This sale was founded upon the second attachment, to which objections were taken and disposed of before the order for sale. One-fifth of the property originally attached was released as not being subject to the attachment, on the objection of some of the Sirkars. Rass Monee Dossee also came in as an objector, alleging her mortgage interest, and the result of that was that, by the lotbundee, the property was put up expressly as subject to her mortgage. All therefore that she bought at the execution sale was the equity of

redemption remaining in the Sirkars subject to the mortgage to her. She then took proceedings to recover possession of the land; but she was met by the defendants, the Chowdrys, who alleged that they held the land under pottahs granted by the Sirkars. After this she seems to have slept upon her rights for seven or eight years, at the expiration of which period she commenced the present suit.

The title so set up by the Sirkars was of this kind. The commencement of it was alleged to be a bhaug or share pottah, dated the 17th April 1833. From that instrument (of which a copy is set out at page 19 of the record, and which was afterwards produced to the High Court) it appears that the land was granted to them for the purpose of having a bazaar erected upon it at their expense, the arrangement between the Sirkars who granted the land and their lessees being that the latter were to pay a 2 annas and 10 gundahs share of the profits of the bazaar, retaining 13 annas and 10 gundahs for themselves. The duration of this tenure is, upon the face of the bhaug pottah, somewhat indefinite. It was evidently intended to be of an hereditary character, because heirs are mentioned; but there is a stipulation towards the end of the pottah that if the lessees wished to give up the bazaar they should be at liberty to do so, and that in that case the lessors would either purchase the huts and other things incident to the bazaar which had been erected on the land, or allow the lessees to dispose of them elsewhere. And there is also a stipulation that if the lessors wished to transfer their right in the land, they would give the lessees information of their intention to do so, and would give the latter a right of preemption.

The case of the respondents, however, goes further than this. They allege that, on the 2nd October 1836, the Sirkars executed to them a permanent mooroossee pottah, which materially altered the relation of landlord and tenant. The effect of that was to give them in terms a perpetual mooroossee pottah, in consideration of a salami of Rs. 1,000 and a reserved rent of Rs. 600 per annum, commuting the share of the profits to which the lessors had been previously entitled for that rent of Rs. 600.

This is the second of the deeds of which the validity is in question in this suit.

I have not alluded to a third deed, which appears to have come out in the course of the proceedings, and to have been first produced in the High Court, because it was

only a second bhang pottah, which does not appear to relate to the property in question in this suit, but rather, as their Lordships understand it, to the one-fifth of the land which had been released from the execution. It was in nearly the same terms as the original bhang pottah, and there is no issue directed to try the validity of that deed in this suit.

That being the state of the case, the two principal questions which have been argued upon this appeal are, first, whether, as represented by the plaintiff, these deeds, or either of them, were or was fraudulent and collusive, and a contrivance between the Sirkars and the Chowdrys to defeat the creditors of the former, or whether they were *bonâ fide* documents; and, secondly, whether, if admitted to have been *bonâ fide* conveyances, they are not void as against Rass Monee Dossee by reason of their having been executed whilst the first attachment was still subsisting and in force.

Their Lordships propose to deal with the first of these questions in the first instance, and without going at length into the evidence. The Principal Sudder Ameen seems to have found that the first bhang pottah had not been formally or properly proved before him. He also thought that the second pottah was a collusive document, and had not been proved to be a genuine one; but he seems to have admitted, by the very form of his judgment, that in some way or other the respondents had been *bonâ fide* in possession of the property; that they had, under and by virtue of the arrangements (whatever they may have been) which subsisted between them and the Sirkars, laid out large sums in establishing this bazaar, and that, by reason of that expenditure, they were entitled to be allowed one-half of the wasilat, or mesne profits, of which Rass Monee Dossee, by her suit, had claimed the whole.

The High Court, on the other hand, has found that both the documents must be taken to be genuine, or at least that they had not been shown to be collusive documents, and that the long possession of the respondents had been held under them and by virtue of the title which they conferred, and that the suit ought to be dismissed.

Their Lordships, upon the evidence, cannot feel any doubt but that under the share pottah there has been a *bonâ fide* possession during many years on the part of the respondents. The possession in fact, they think, cannot be disputed. There is

nothing to which they can attribute it, except the title commencing with that document. They therefore do not quarrel with the finding of the High Court upon that point.

Then, as to the second mooroosee pottah, the objections seem to be, first, the inadequacy of the consideration stated; and secondly, that although in the course of the proceedings in the suit of Ramruttun Roy the bhang pottah was there put forward and apparently proved, no mention was made of this second or mooroosee pottah. Their Lordships do not deny that these circumstances cast some suspicion upon this document. On the other hand, looking to the whole of the *res gestæ*, and to the statement made by the Sirkars on the occasion of the revenue settlement to the effect that the Chowdrys were in possession under a permanent mooroosee tenure, their Lordships do not feel at liberty to say that the finding of the High Court in favor of the second pottah was wrong, or one which they would be justified in now disturbing.

There was certainly evidence upon which the Court might come to that conclusion. Besides the evidence of one of the subscribing witnesses, there was that of two other witnesses, of whom one was a member of the family of the Sirkars. No doubt the Judge of first instance was not disposed to act upon this testimony. On the other hand, the High Court finding it corroborated by the circumstances to which I have referred have accepted it as true. Their Lordships cannot say that they were wrong in so doing. If the mooroosee pottah were executed when it bears date, the whole of the respondents' title was completed before the grant of the plaintiffs' mortgage, and when there was no adequate motive for the commission of a fraud. If, on the other hand, this document were concocted at a later date, and to defeat the plaintiffs' claim (of which there is no proof), the parties would hardly have assigned to it a date which exposes it to the objection next to be considered.

That objection is whether, supposing the documents to be neither fraudulent nor collusive, they were void as against Rass Monee Dossee, by reason of the date at which they were executed, *viz.*, whilst the first attachment was subsisting.

On that point we have been referred to a great many authorities, and it may be admitted that there is some difficulty in reconciling all the cases on the construction of the prohibition against alienation which is

involved in an attachment under the new procedure, and seems to have been equally involved in an attachment according to the old procedure. But it appears to their Lordships that one point at least has now been conclusively settled, *viz.*, that the prohibition against alienation avoids the conveyance only as against the execution creditor, or some person entitled to claim under him.

Again, it follows from the first case, which was cited by Mr. Leith (Gobindhun Singh, appellant, Meer Mushun Alee and others, respondents, Bengal S. D. A. Reports for 1855, p. 244), as in fact he admitted, that if an attachment has been permanently struck off and a new attachment has become necessary, a conveyance which is executed by the judgment debtor between the two attachments will be valid. And one result of that rule, when applied to the present case, is that the conveyances by which Rass Monee Dossee acquired her interest as mortgagee must be taken to have been valid, notwithstanding the old attachment which had been issued in 1830.

It may, however, be argued, that although a conveyance executed between the striking off of the first attachment and the issuing of the second may be valid, it does not follow that one executed whilst the first attachment was subsisting becomes valid by relation, or ceases to be void as against the execution creditor and those who claim under him. That seems to be a point which is not touched by the authorities cited. Their Lordships, however, are of opinion that in this case Rass Monee Dossee cannot claim the benefit of any such rule, if it exists. Her case is peculiar. After the first execution was struck off she became mortgagee. When the second attachment was taken out she intervened in the proceedings as an objector. The result of that was that the property was put up for sale as subject to her mortgage. She therefore bought only the equity of redemption, and presumably paid a smaller price than the property would have realised if it had not been sold subject to her mortgage. She did not buy the subject which was originally attached, *viz.*, the whole property free from mortgage, but the mere equity of redemption. She cannot be allowed to say that the original attachment ceased to be operative so as to give her the power of acquiring the mortgage interest subject to which she has purchased, and yet to claim the benefit of it, in order to defeat conveyances which would unquestionably have

been binding between the Sirkars, the judgment debtors, from whom she took her mortgage, and the respondents in this case, if there had been an end of the execution altogether.

Their Lordships moreover are not prepared to say that in this case it would, under any circumstances, have been competent to the judgment creditor, or any person claiming under him, to say that conveyances executed pending the first attachment were absolutely null and void. It seems to their Lordships that generally where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not mean to lay down broadly that in all cases in which an execution is struck off the file such consequences must follow. The reported cases sufficiently show that in India the striking an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and accordingly their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained.

Their Lordships desire to add that the extraordinary and unexplained delay which has taken place in the conduct of this suit would have increased their regret at finding themselves compelled, if they had been compelled, to give way to the objection that these instruments were null and void by reason of the date at which they were executed. The effect of allowing this appeal would be to disturb a possession, now found to be a *bonâ fide* possession, which has endured for 40 years.

For much of this delay Rass Monee Dossee and the appellants are responsible. It has been stated that seven years elapsed between the first assertion of the respondents' title and the institution of the suit, and it appears that this appeal had been some ten years in the country before it was brought to a hearing.

For the reasons above stated their Lordships have come to the conclusion that it is their duty to advise Her Majesty to

affirm the judgment of the Court below, and to dismiss the appeal.

As it has been heard *ex parte* there will be no order as to costs.

The 17th May 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock,
Sir Montague E. Smith, Sir Robert P.
Collier, and Sir Lawrence Peel.

*Hindoo Law—Self-acquired Property—Son's
Consent.*

*On Appeal from the High Court of Judi-
cature at Fort William in Bengal.**

Rajah Bishen Perkash Narain Singh

versus

Bawa Misser and others.

Under the *Mithila* law, self-acquired property can be given by its owner at his pleasure.

The *Mitakshara* law requires the son's consent; but the fact of the son's being in debt does not incapacitate him from consenting.

THE facts of this case and the law which arises upon them may be very shortly stated. Dabee Dutt Misser, shortly before his death, executed an instrument, whereby he gave to his only son, who was considerably in debt at that time, his ancestral property. His self-acquired property he gave to his grandsons and to his then second wife, afterwards his second widow. At the same time he made his son the guardian of these grandsons during their minority. It was contended in the first place that he had no right to make this disposition of his property, and secondly that this deed was fraudulent; the intention of Dabee Dutt being that, although upon the face of the deed the property was given to the grandsons, it should really belong to the son, and that the transaction was not a real but a colorable one. The Principal

Sudder Ameen appears to have adopted this view, but their Lordships are of opinion that there was no sufficient evidence to support it. The only evidence at all pointing in the direction of that finding would be that, after the death of Dabee Dutt, the son remained in possession of the property, but inasmuch as the grandsons were minors and he was appointed their guardian, that possession was not inconsistent with the deed.

The High Court reversed the decision of the Principal Sudder Ameen, finding that the transaction was a real one and not merely a colorable one, a finding in which their Lordships concur.

It only remains then to be decided whether or not by law Dabee Dutt was enabled to make this disposition of his property. The transaction occurred within the Mithila District, and the Mithila law would prevail. Of that law the principal authority is the *Vyavada Chintamana*, in which it is laid down in very plain terms, without qualification, that self-acquired property can be given by its owner at his pleasure, and subsequently it is stated that "the father has full dominion over the property of his father, which, being seized, is recovered by his own exertions, or over that which is gained by him through skill, valour, or the like. He may give it away at his pleasure, or he may distribute it." In their Lordships' view this dictum would apply.

But it has been argued that, under the *Mitakshara* law, the father could not dispose of the property away from his son without the son's consent. The *Mitakshara* law appears to be referred to undoubtedly by the learned Judges of the High Court as applying to this case. But assuming what it is not necessary to decide, that the *Mitakshara* law applied, and assuming the *Mitakshara* law only to admit of the father making such a disposition with the consent of his son, in this case the consent of the son was given. It was indeed argued that because the son was in debt he could not consent, but their Lordships are of opinion that there is no foundation for that argument. The consent of the son was given, and in either view Dabee Dutt exercised a power which by law appertained to him.

On these grounds their Lordships are of opinion that the decision of the Court in India was right, and that this appeal must be dismissed with costs, and will humbly advise Her Majesty to this effect.

* From the judgment of Kemp and E. Jackson, JJ., in Regular Appeal, No. 83 of 1868, decided 21st August 1868, —10 W. R., 287.

The 4th June 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Joint Proprietorship—Right of Action.

Case No. 1662 of 1872.

*Special Appeal from a decision passed by
the Judge of Sarun, dated the 24th June
1872, reversing a decision of the Moonsiff
of Chuprah, dated the 13th December
1871.*

Gokool Pershad (one of the Defendants)
Appellant,

versus

Etwaree Mahto (Plaintiff) *Respondent.*

*Baboo Bama Churn Banerjee for
Appellant.*

Baboo Taruck Nath Sen for Respondent.

A member of a joint family has no right in law to sue alone for the recovery of property belonging to other members as well as himself. If he cannot induce them to join him in a suit, he must make them defendants.

Phear, J.—It seems to be pretty clear that the present plaintiff had no right to bring this suit alone. He is not the sole person entitled to the property which he seeks to recover, because his father, who is not a party to the suit, is admittedly a member of the same joint family with the plaintiff, and to that joint family, and not to the plaintiff alone, the property belonged. Of course, if the plaintiff could not induce his father to join with him in bringing the suit, he might have made him a defendant, and so brought before the Court all the persons who were jointly interested in the property which was sought to be recovered. For some reason or

other he, the plaintiff, did not take this course. Possibly it is not difficult to see a reason why the father should avoid being a party to the suit so far as he could.

The Court of first instance, on the objection of the defendant, held that the plaintiff could not alone bring the suit, and therefore for this and other grounds dismissed it.

The Lower Appellate Court, however, was of opinion that neither the defendant nor any one else was injured by the plaintiff's bringing the suit alone without his father being joined with him. It seems to us that the Lower Appellate Court was wrong in this view. It was wrong for the reason that we have already mentioned, namely, that the plaintiff had no right in law to recover alone. It was also wrong for another reason, namely, that, inasmuch as the plaintiff's father was not a party to this suit, any decree which would finally be passed in it could not be made use of as a bar or otherwise by the defendant in any future proceedings which the father himself might bring.

We said just now that it was not difficult to see a reason why the plaintiff's father should keep out of the suit if possible: the reason is this, namely, that the bond which forms the foundation of the defendant's title to resist the claim of the plaintiff, is a bond which was executed by one Byjoo, and signed as a witness by the father of the plaintiff. This bond, it seems, purported to convey or to mortgage the whole of the house, and not merely Byjoo's share. It therefore became a very material issue in this case whether the father by signing the bond in the capacity of a witness was not estopped from disputing its operation in passing the whole of the property which it dealt with. If he had been a party to this suit, that issue would necessarily have been the first issue which would have been tried. As he is not a party to this suit, it was not directly an issue between the defendant and the present plaintiff. It could only be made an issue upon the footing that the plaintiff's right to sue was inseparable from his father's.

Under all the circumstances of this case, it seems to us that it really was a very material omission indeed in the plaintiff's case that his father was not joined with him in this suit, or at any rate made a party to the suit.

It seems to us that the judgment of the first Court was a correct judgment, and the decision of the Lower Appellate Court must be reversed with costs.

The 4th June 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Ryot's Right of Occupancy—Zemindar's Proprietary Rights—Transfers—Trespass—Damages.

Case No. 777 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 5th February 1872, reversing a decision of the Subordinate Judge of that district, dated the 27th July 1871.

Bibee Suhodra and others (Plaintiffs)

Appellants,

versus

Mr. Maxwell Smith, Mookhtear (Defendant)
Respondent.

Messrs. J. T. Woodroffe and C. Gregory
and Baboo Chunder Madhub Ghose for
Appellants.

The Advocate-General and Mr. R. E.
Twidale and Moonshee Mahomed Yusoof
for Respondent.

A ryot's right of occupancy, resting upon legislation and custom alone, is not derived from the general proprietary right given to the zemindar by the legislature; but derogates from and qualifies that right.

Whatever the ryot has, the zemindar has all the rest which is necessary to complete ownership of the land; and amongst other rights he must have such a right as will enable him to keep the possession of the soil in those persons who are entitled to it. The ryots have no power to transfer to a third party their right to have possession of, and to use, the soil for their own benefit.

Where such a transfer has been made, and the transferee is in possession, the zemindar as owner has a right to evict him as a trespasser, and to claim damages to the extent of so much of his rents and profits as the trespasser prevented him from receiving.

Phear, J.—THE principal plaintiff in this case says that she is malik of a certain 8-anna puttee; that she formerly let it in ticca for a term of years to one Chowdhry Jugdeo Narain Singh; and that the defendant became a kutkinadar under him. She states in substance that Jugdeo's term came to an end in 1272, and that the defendant ought then to

have gone out of possession; that she required him to do so, but that he refused; that he still does refuse, and that he remains in wrongful possession.

The plaintiff further says that the defendant, taking advantage of his position as kutkinadar, had, during the existence of the term, contrived to get possession of the lands in suit, and procured several kobalahs to be executed in his favor by the ryots, which kobalahs purported to convey to him the right of cultivation; but the plaintiff asserts that these kobalahs were inoperative to transfer to him any right to the soil for four reasons: 1st, because the right of cultivation of the tenants is not transferable; 2nd, because the conveying ryots had no right of occupancy; 3rd, because the right of cultivation can, under no circumstances, be transferred without permission of the landlord; and 4th, because some of the makers of the kobalahs in question are not even ryots or occupiers of land within the puttee.

On the foregoing state of facts, the plaintiff sues to have the kobalahs set aside and to recover possession of the land from the defendant, together with Rs. 1,450 as mesne profits.

The defendant admits that he is in actual possession of the land, and he also admits the plaintiff's title as alleged by her and the termination of the ticca lease; but he says that he obtained possession of the land by virtue of the kobalahs which the plaintiff questions, and he maintains that these give him a good title to cultivate the soil and to retain possession against the plaintiff.

In the situation thus taken up by the parties to the suit, it became incumbent on the defendant to prove—

1st.—The factum of conveyance to him of the right of cultivation upon which he relied.

2nd.—That the conveying parties respectively possessed such a right of cultivation as they could lawfully transfer to him without the assent of the zemindar.

A preliminary question was raised at the trial, namely, whether, on the allegations of the plaintiff, she had any right at law to claim possession of the land from the defendant. It was argued in substance that the transfer by the ryots of their occupation rights to the defendant, even if illegal, did not amount to abandonment of the soil; that at most it was a void and inoperative act, a mere attempt to transfer; and that consequently, so far as the plaintiff was concerned, the transferring ryots were still in occupation of the soil and responsible for the rents: if

it suited them for any reason to give the defendant leave and license to use their land, the plaintiff could not complain.

As the authorities stand, this question seems to be one of some nicety, and in considering it there is need to bear in mind that the relations between the zemindar and the ryot are not generally the same as those between the English landlord and tenant. No doubt the zemindar has been made by legislative enactment the *proprietor* of the land which forms his zemindary; and as regards his khamor, nijjote, or seer land, it may be taken that the cultivator of the soil has generally no other rights than those which he obtains as a tenant by contract with the zemindar; but with regard to the ryotee lands, which constitutes the bulk of the zemindary, it is much otherwise. There, while the zemindar is still proprietor of the land, the ryots of the village as the combined effect of custom and legislation have in most, if not in all, cases some right to cultivate the ryotee land of the village which is altogether independent of the zemindar; and which, in the case of a ryot having a right of occupation, is a right to occupy and use the soil quite irrespective of any assent or permission on the part of the zemindar. This right resting upon legislation and custom alone is not derived from the general proprietary right given to the zemindar by the legislature, but is, as we understand, in derogation of, and has the effect of cutting down and qualifying, that right. We may say that, in our conception of the matter, the relation between the zemindar's right and the occupancy ryot's right is pretty much the same as that which obtains between the right of ownership of land in England and the servitude or easement which is termed profit *à prendre*; i.e., although we need hardly say the ryot's interest is greatly more extensive than a profit *à prendre*, it appears to us that the ryot's is the dominant, and the zemindar's the servient right. Whatever the ryot has, the zemindar has all the rest which is necessary to complete ownership of the land. The zemindar's right amounts to the complete ownership of the land, subject to the occupancy ryot's right, and the right of the village, if any, to the occupation and cultivation of the soil, to whatever extent these rights may in any given case reach. When these rights are ascertained, there must remain to the zemindar all rights and privileges of ownership which are not inconsistent with or obstructive of them. And amongst other rights, it seems to us

clear that he must have such a right as will enable him to keep the possession of the soil in those persons who are entitled to it, and to prevent it from being invaded by those who are not entitled to it.

Starting from this position, let us return to the question proposed. Do the facts upon which the plaintiff relies constitute a good cause of action against the defendant? It seems to us that they do. According to those facts the defendant is in actual possession of the soil, tilling and using it for his own benefit, and he has got himself into that situation under color of an alleged transfer to him effected by certain ryots of their right to have possession of and to use the soil for *their own* benefit; but, upon the plaintiff's case, these ryots had no power to make such a transfer of their right, and therefore so far as title in himself is concerned derived through this transfer, the defendant clearly has no right to the possession. Then can the defendant say that as regards the plaintiff the transaction of transfer, although it failed to pass any right to the defendant himself, yet served to place the defendant's possession under the protection or sanction of his grantor's rights? We think not; because we cannot extend the mere right of occupancy beyond the right on the part of the person entitled to it to occupy and till the soil, either by himself or his servants or by his lessees or licensees, i.e., at the furthest by persons who are in some degree subordinate to him and under his control throughout the whole time of the possession. Now it is very plain on the plaintiff's facts that, as between the defendant and his grantors, the defendant cannot possibly be in any degree dependent upon them in the matter of the possession, because he has obtained from them a complete transfer of all their rights. It appears to us almost absurd to hold that a zemindar in such a case as that made by the plaintiff, where no matter of estoppel occurs, is obliged to treat the possession of one who is, and whom he knows to be, entirely free of all dependence upon his ryot, as being the possession of that ryot. And we think we could, if it were necessary, show that serious mischief might in practice ensue from the application of this doctrine. Thus on the plaintiff's facts, we arrive at the conclusion that the defendant has no title himself to the occupation of the soil, and that his occupation of it cannot be justified by the force of his grantor's title. Therefore, in our opinion, the defendant is an entire

stranger to the soil and a trespasser, and the zemindar as owner has a plain right to evict him in order to protect the possession, if in so doing he only exercises a right of ownership which is not in conflict with the ryot's right of possession. Then does the act of recovering back the possession from a stranger, who as against the zemindar is wrongfully holding it, conflict with the right to that possession on the part of the ryot who has voluntarily parted with it? It appears to us plainly not; for the only right which, under the circumstances, the ryot can have left to him is to regain the possession from the zemindar after the latter has recovered it from the stranger, because he certainly could not himself recover it from the stranger to whom he had transferred it for valuable consideration. If he had no right as against the zemindar to transfer the possession, surely no right of his to the possession can be infringed by the zemindar's claiming the possession from the transferee; though possibly, on being obliged to refund the purchase-money, he may turn to the zemindar and successfully maintain that his ineffectual attempt at transfer did not cause him to forfeit his original right to occupy the land.

This view accords with the judgment of the late Mr. Justice Norman, reported in VII Weekly Reporter, page 114, and is not opposed to the judgments which are reported in V Weekly Reporter, page 147, and XV Weekly Reporter, page 261.

We think, therefore, on the whole, for these reasons, that the plaint does disclose a cause of action upon which the plaintiff may seek to recover as against the defendant possession of the land which is the subject of suit.

As regards the mesne profits, of course, they must be estimated by the damages which the zemindar may be shown to have sustained by reason of the wrongful possession, if wrongful possession be made out. That will not be the profits of a cultivator, because at no time during the dispossession was he, as we understand, entitled to the soil for the purposes of his own cultivation. The damages must be as much of the zemindar's rents and profits as the defendant may, during the time he had been in possession of the land, have been the cause of preventing the plaintiff from receiving.

Then as to the other issues which we have mentioned, the Lower Appellate Court has come to the conclusion that the

defendant has established both of them. The Judge says, that he arrives at the conclusion that the transfers from the ryots to the defendant upon which the defendant relies are proved; and also that those ryots had tenures which they were capable of transferring. But it appears very clear that, in dealing with the evidence, the Lower Appellate Court very seriously misapprehended the force of a considerable portion of it. We refer to the evidence of sales held in execution of decrees, the evidence consisting partly of parol testimony, and partly, we believe, of certificates of sales. But in all these instances of sales, so far as they have been brought to our notice, the sales were sales in execution effected at the instance of the zemindar himself; and, consequently, they could not be evidence of the right on the part of the ryots to transfer without the assent of the zemindar. Therefore it seems that the Lower Appellate Court was wrong in considering that the right to transfer these ryots upon which the defendant relied was made out by evidence of this kind. There was also other evidence, namely, the evidence afforded by the original pottahs which some of the transferring ryots seem to have put in as being the pottahs under which they held their occupation rights. As the Lower Appellate Court represented them, these pottahs contained a clause giving a power of transfer: and if that be so, of course the pottahs, when proved to be authentic, would be conclusive evidence in support of the defence which the defendant set up. But we have it also shown to us that these pottahs were held not to have been proved in the first Court, and there was some doubt thrown out how far there was evidence on the record to prove them. The Lower Appellate Court, therefore, seems to have fallen into error in assuming that the pottahs were good evidence in support of the defendant's case, without giving any attention to the means by which the defendant had proved them to be authentic.

Under these circumstances, we think that the finding of the Lower Appellate Court upon which its judgment is based cannot be depended upon, and that the judgment must be reversed and the case sent back to the Lower Appellate Court for retrial of the question whether or not the persons from whom the defendant claims to have obtained the land in suit by transfer had as against the zemindar a right to transfer without his assent.

Costs will abide the event.

The 4th June 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Decree—Execution—Boundaries or other Specifications.

Case No. 1575 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of 24-Pergunnahs, dated the 31st July 1872, reversing a decision of the Moonsiff of Barripore, dated the 25th April 1872.

Shib Narain Banerjee (Plaintiff) *Appellant*,

versus

Ram Narain Lushkur and others
(Defendants) *Respondents*.

Baboos Kalee Mohun Doss and Oopendro Chunder Bose for Appellant.

Baboos Sreenath Doss and Ashootosh Dhur for Respondents.

The mere omission from the schedule annexed to a plaint of the boundaries or other specifications of land will not exclude from the operation of the decree matters which are by name strictly claimed in the plaint and referred to as such in the decree, and which do not need any further specification.

Jackson, J.—It seems to us in this case that the special appellant must succeed. He brought this suit to recover the rents of certain ticca lands purchased from one Mohesh Chunder Sircar, the said Mohesh Chunder being in possession under a decree obtained under a solehnamah in which the said ticca lands were stated to belong to talook Bagdoho No. 106.

The Lower Appellate Court has dismissed the plaintiff's suit, on the ground that the schedule annexed to the plaint contained no specification or boundaries, and that it was not proved that the plaintiff's vendor obtained a decree for the lands the rents of which were now sued for. The words of the solehnamah are as follows:—“এবং বাগদহ প্রভৃতি ১০৬ নং তালুক ও তৎস্থিত ঠিকা মৌরসী ও বেলতলা প্রভৃতি অন্যান্য গ্রামহায়ের খেরাজ লাখেরাজ এবং অন্যান্য আমলা ও পুষ্কনী যে সকল স্থাবর বিষয়ের তফসিল ও চৌহদ্দী আরজিতে লিখিয়া দাখিল করিয়াছি।” It appears to us by no

means clear whether the word “চৌহদ্দী” contained in the concluding part of the sentence did not merely refer to the smaller items described as “আমলা ও পুষ্কনী” which come immediately before; but even if it be held to apply to the whole of the properties mentioned above, we are still of opinion that the mere omission to give the boundaries or other specifications in the schedule will not exclude from the operation of the decree matters which are by name strictly claimed in the plaint and referred to as such in the decree, and which do not need any further specification. The ticca lands in question appear to be situated within the area of the talook and are appurtenances to it, and unless specifically excluded would go with the talook. As the case stands, it seems to be mere quibbling to say that the lands were not further specified and the boundaries not given in the schedule. There is no doubt that the parties intended that the solehnamah should cover the land in dispute. The judgment of the Subordinate Judge is reversed, and that of the first Court restored with costs.

The 6th June 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Rent Suit—Jummabundees—Patwarry—Evidence.

Case No. 1630 of 1872.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 7th June 1872, reversing a decision of the Moonsiff of that district, dated the 22nd September 1871.

Dhanookdharee Sahee (Defendant)
Appellant,

versus

Mr. George Toomey (Plaintiff) *Respondent*.

Baboo Nil Madhub Bose for Appellant.

Messrs. R. T. Allan and R. E. Twidale for Respondent.

Jummabundee papers for the year in respect of which rent is claimed, made out by the officers of the person claiming the rent, cannot be evidence of his right to that which they set forth; though the evidence of the Patwarry (as being the officer usually charged with the

duty of collecting the rent) as to the amounts collected in previous years, corroborated by the jummabundees of those years, would be conclusive in respect of the claim.

Phgar, J.—In this case the ticcadar sues for arrears of rent which he alleges were due for the years 1275, 1276, and 1277, in respect of 7 beegahs and 2 cottahs of land from the defendant.

The defendant acknowledges that he holds 6 beegahs 5 cottahs of land of the plaintiff's zemindar, and admits that he is in arrear of rent in respect of that; but he says with regard to the remaining 17 cottahs of the land that they are his lakheraj land, and not the mal land of the zemindar.

The first Court was of opinion that the plaintiff failed to make out any claim for rent in respect of these 17 cottahs of land. But the Lower Appellate Court formed an opposite opinion.

The Judge says:—"He (defendant) merely objected on the ground that the 17 cottahs claimed in excess by the plaintiff were malikanah. This then becomes a special objection, and as such the onus lay on him who raised it, namely, the defendant."

It appears to us clear that the Judge of the Lower Appellate Court is wrong in this position. In his defence set up, the defendant said that he was a stranger altogether in respect of these 17 cottahs. In that state of the pleadings, it was incumbent upon the plaintiff before he could succeed to give some evidence, at any rate, of the zemindary right to rent for these 17 cottahs. Perhaps in this particular case very slight evidence might have been sufficient for the purpose, because it seems that the defendant admits that there is no definite boundary between the 17 cottahs of lakheraj and 6 beegahs 5 cottahs of the zemindar's mal. And, no doubt, when a ryot or any other person in the position of a tenant allows his own land to be confused with the land for which he is bound to pay rent, he must bear the responsibility and the burden, when necessary, of making out where the line of boundary lies. Still the plaintiff, in order to start his case, was bound to establish a *prima facie* ground for claiming rent in respect of the entire 7 beegahs 2 cottahs for which he brought the suit.

The Judge goes on to say:—"The defendant has merely made a statement to the effect that in the village there are some 200 beegahs of malikanah land in the village, but this does not prove that the 17 cottahs are within the said 200 beegahs." No doubt it does not; but it affords a color to,

or raises a reasonable probability in favor of the defence. And it seems from the evidence which has been put forward in this case, that it is a fact that there are 200, or some other considerable number of beegahs of malikanah land in this village.

Then the Judge says:—"The plaintiff on his part produced good proof, viz., the jummabundees for the years for which the rent is claimed, as also the evidence of a Patwarry and other witnesses which is as good evidence as a ticcadar can produce."

It appears to us that the Judge has erred in this statement. The jummabundees for the year in respect of which the rent is claimed, made out by the officers of the person who is claiming the rent, cannot, we apprehend, be in any degree evidence of the right of the person claiming to that which these jummabundee papers set forth. No doubt, the Patwarry, as being the officer usually charged with the duty of collecting the rents of the village, if he could say that he had in previous years collected from the defendant the amount which the present plaintiff claims, and had collected it in respect of the quantity of land for which the plaintiff sues, and had corroborated this testimony in regard to his own acts of collecting by jummabundee papers of the corresponding years,—the evidence so furnished would be about as conclusive in respect of the ticcadar's claim as it well could be made. It could only be met by such cross-examination or counter-evidence as would show that the Patwarry's testimony could not be relied upon.

We think then that the Judge has committed a serious error in discussing the value of the evidence upon this record when he starts with the assertion that the jummabundees for these years deposed to by the Patwarry were alone as good evidence as the ticcadar could produce.

The Judge further says, that "an Ameen was deputed by the Moonsiff to hold a local enquiry: his report was to the effect that the land was mal land. The Moonsiff gives no reason for distrustfuling his report. Having deputed him, he should have made use of his report or recorded reasons for not doing so."

The Moonsiff's judgment has been read over to us, and it seems to us that the Judge has not quite correctly represented the Moonsiff in this respect. Whether the Moonsiff's reasons were good or bad, it certainly seems that he took the Ameen's report into

consideration, and stated the grounds for which he thought he could not rely upon it.

For these reasons, it seems to us that the judgment of the Lower Appellate Court is unsatisfactory and must be reversed. We think further that the case must be sent back for retrial. If there had been no more evidence upon the record than that with which the Lower Appellate Court deals, we should have been of opinion that we could best dispose of the case here. But it seems that the Patwarry, of whom the Judge speaks, not only attested the jumma-bundee papers for the years 1275, 1276, and 1277, but also stated certain facts with regard to the collections of rent from the defendant in previous years. What the value of his statements on this head is, perhaps it may not be very easy on the record as it stands to say, but at any rate it seems to us that the Judge ought to give some consideration to them. In giving consideration to them, it will be very important to remember that besides the jumma-bundee papers for 1275, 1276, and 1277, which were proved by the plaintiff, a copy of the zemindar's jumma-bundee for the year 1265, taken from among the documents which were filed by the zemindar in a former suit, was put in this case by the defendant, and as we understand not apparently denied by the plaintiff. It appears to have been used as evidence between the parties: and the Moonsiff says that it appears by the jumma-bundee that the quantity of land held by the defendant of the zemindar and paid for by him in the year 1265 was 17 cottahs less than that for which the rent is now claimed. This is a document which by its nature must tell very hardly indeed against the plaintiff if it is authentic, because it seems to be statements which have been made in another matter by the defendant himself, or rather by the zemindar his grantor: if they are not absolutely conclusive upon the zemindar, they would be of the very greatest weight indeed against him, and they would be of the same weight and importance as evidence against the plaintiff, who claims under the zemindar, *i.e.*, by a *ticca* title from the zemindar.

Then with regard to the Ameen's report, there is no doubt much cause for thinking that the Ameen treated the matter which he was deputed to investigate very much as if he were a Judge called upon to weigh and estimate the value of opposing evidence bearing upon the issues which the parties had raised between themselves in the suit.

We need not say that this was not his proper function. His duty was, by the aid of inspection of the locality, and such evidence as it was convenient that he should take on the spot, to ascertain so much of the boundaries of the different plots of land, which were relevant to and of importance in the matter in dispute as he could ascertain, and to represent these features of the locality, together with the depositions which he had taken, to the Court which had deputed him. So far as his report contains materials of this kind, it may be very valuable for the purposes of this suit, and ought to have all possible considerations given to it. But it ought not to be treated, we think, as being quite of such a conclusive character between the parties as the Judge of the Lower Appellate Court seems to have treated it.

With these observations as to the state of the evidence upon the record, we will conclude by saying that we think the decree of the Lower Appellate Court must be reversed, and the case sent back to be retried upon the evidence which is on the record.

Costs will abide the event.

The 6th June 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Cause of Action—Res Adjudicata.

Case No. 1470 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 30th May 1872, affirming a decision of the Sudder Moonsiff of that district, dated the 26th March 1872.

Lalla Luchmun Sahoy (Plaintiff) *Appellant,*

versus

Ramsaru Pandayain and another (Defendants)
Respondents.

Moonshee Mahomed Yusoof for Appellant.

Messrs. R. T. Allan and C. Gregory for
Respondents.

Where a party once before brought a suit which, as against the present defendant, was based on the same cause of action as he now sues upon, and in which he might have made the present claim, but did not do so, he cannot bring a second suit on the same cause of action for that purpose.

Phear, J.—THE plaintiff, one Lalla Luchmun Sahoy, claiming to be *mokurrureedar* of

4 annas out of 16 annas of Mouzah Pandabiggha, sues Ramsaru Pandayain as widow and heiress of one Ramburaun Panday, seeking to recover Rs. 23-11-2, arrears which he says are due in respect of his own share out of a sum of Rs. 106-9-7 deposited on the 24th January 1862 in the Collectorate by one Jafar Ali, ticcadar, as rent of the ticca of Mouzah Pandabiggha from 1264 to 1268.

He says, that in Jeyt 1256 the defendant's deceased husband gave to two persons a pottah of the whole mouzah in question for a term which extended from 1256 to 1276 at a rent of Rs. 155 and, on an advance of Rs. 300; that in 1263 this ticca interest was purchased at an auction-sale by Jafar Ali, and in 1269 Jafar Ali sold the ticca to Keshub Ball Mohajun, and about the same time, either before or after selling it, he deposited in the Collectorate the money which I have mentioned as arrears of rent from 1264 to 1268. In the meanwhile, namely, in 1262, the defendant's husband died, and she succeeded him in the property. And in the following year, in 1263, she granted to the plaintiff a mokururee of 4 annas of the mouzah for a bonus of Rs. 250, at a rent of Rs. 39, consisting of two items, namely, a sum which was to be made for Government revenue of Rs. 35-12-9, and an actual rent to the defendant of Rs. 3-3 annas and odd.

The plaintiff further states somewhat vaguely in his plaint, for a reason that is apparent before the pleadings terminate, that in 1273 the defendant's zemindary right, subject to his, plaintiff's, mokururee, was sold by auction and purchased by some one whom he does not name. The plaintiff says that he had previously claimed this Rs. 23 from the Collectorate, but that the defendant on that occasion objected, and he was obliged to bring a suit for it. He sued the present defendant and Jafar Ali, and at first succeeded, but eventually was obliged to withdraw his suit because he failed to prove his title to the property in respect of which the deposit was made; and he got leave to sue again. Accordingly he sued again, sued the present defendant and others, asking for a declaration of his title, but not asking to recover this Rs. 23. And he says that he eventually obtained a decree on the 13th April 1871, against which the present defendant did not appeal specially. He then complains that, notwithstanding this decree, the defendant still resists his taking out the

money, and therefore he now brings this present suit.

It is not necessary for me to describe the position which was taken up by the defendant. I will only mention that Doorga Pershad, the auction-purchaser of the defendant's zemindary right in 1273, intervened.

It appears to me that the very last clause of the plaintiff's suit furnishes a bar to the present suit. He had before admitted that he brought a suit against this defendant to recover Rs. 23, which he could not get from the Collectorate because the present defendant objected that he had no title to the mokururee tenure in respect of which he sought it. She objected for precisely the same reason and at the same time to his recovering, or getting a declaration of his right to, the mokururee tenure. And when he had liberty to bring a fresh suit, it seems to me that he was bound to claim the Rs. 23 in that suit. It was at that time inseparable from the rest of his claim against the present defendant. He chose to bring a second suit, after he got leave to withdraw, without asking for the Rs. 23. He relied solely upon establishing his title in that suit in order to be enabled to get payment of the money; and he complains, as I have said, in the very last passage in his plaint that notwithstanding he got a decree for his title, the defendant would not let him get the Rs. 23 out of the Collectorate. It is very clear to me that he is barred from bringing this suit by the simple reason that he brought a suit before, which, as against the present defendant, was based on the same cause of action which he now sues upon, and that inasmuch as he might in that suit have made the present claim, he cannot bring a second suit on the same cause of action for that purpose.

In this view, it is not necessary for me to consider the question which was raised during the argument, namely, the question whether he could be allowed to establish his claim to this Rs. 23 as being money originally deposited for him with a stakeholder under designation of title by making out that he was the person who at the time of the deposit was entitled as designated, and for whose benefit therefore it was deposited and held,—whether he could be allowed to do this notwithstanding that he was barred by the operation of the Limitation Act from asserting that title as an existing title for the purpose of recovering the property to which the title related. I say it is not necessary to consider that question, because

I think that he is, upon the allegations of fact made in his own plaint, professing to establish a claim against the defendant which he might and ought to have made in a former suit against the same person.

The Lower Appellate Court has dismissed the suit on the ground that it is barred by limitation: therefore in effect the decision is right, and this appeal must be dismissed with costs.

Ainslie, J.—I concur in this judgment. I also think that the 29th Section of the new Limitation Act, Act IX of 1871, operates to extinguish the rights of the plaintiff altogether. This portion of the Act was in operation on the 1st July 1871, and this suit was instituted on the 22nd September following. He can only take out this money on the strength of his right or title to the mokurruree, and as that right is extinguished, inasmuch as he cannot now sue for possession, there is an end of the case. Having now no right to the mokurruree, he cannot take out the money by virtue of a right dependent on that mokurruree.

The 6th June 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Rent—Notice of Enhancement.

Case No. 1619 of 1872.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Moorsshedabad, dated the 29th June 1872, modifying a decision of the Moonsiff of that district, dated the 23rd March 1871.

Dinobundhoo Bhadooree (Plaintiff)
Appellant,

versus

Prankishen Sircar (Defendant) *Respondent.*

Baboos Sreenath Doss and Bhugobutty Churn Ghose for Appellant.

Baboos Rash Beharee Ghose and Gooroo Doss Banerjee for Respondents.

In order to enhancement of rent of land consisting of more tenures than one, a separate notice is necessary for each tenure.

Glover, J.—In this case the Lower Appellate Court has found as a fact on the

evidence that the land in possession of the defendant consisted of two tenures, and not of one, as stated by the plaintiff. The plaintiff suing for enhancement of rent after service of notice was bound to prove that the land, the rent of which he sued for, consisted of one consolidated tenure. He failed to do so, and the Subordinate Judge was right in holding that separate notice was necessary. The Subordinate Judge also finds that, as a matter of fact, the grounds of enhancement stated in the notice are not made out.

We see no reason to interfere, and we dismiss this special appeal with costs.

The 6th June 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Rent from Tolls—Jurisdiction—Act VIII (B.C.) of 1869.

Case No. 1620 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 29th June 1872, reversing a decision of the Additional Moonsiff of Magoorah, dated the 31st January 1872.

Robert Savi (Plaintiff) *Appellant,*

versus

Issur Chunder Mundul and another
(Defendants) *Respondents.*

Mr. J. S. Rochfort for Appellant.

Baboo Anund Gopal Paleet for Respondents.

A suit for rent derivable by a lessor from tolls collected by the lessee from persons resorting to a *hat*, is not cognizable under Act VIII (B.C.) of 1869.

Glover, J.—No authority has been quoted to us to show that the provisions of Act VIII (B.C.) of 1869 are larger than those of the old law, or permit an action of this sort, which is for rent derivable, as far as the lessor is concerned, from tolls collected by

the lessee from persons resorting to a certain *hât*. It can scarcely be contended that such a suit is cognizable under the provisions of the rent law. The Lower Appellate Court has held that it was not, and this appeal must be dismissed. The plaintiff ought to have brought the suit in the Small Cause Court, inasmuch as it was a suit for rent below Rs. 500, and therefore of the nature of suits cognizable in the Small Cause Court. Considering that the Moonsiff accepted and registered the suit, which he ought not to have done, instead of referring the parties to the Small Cause Court, we think that each party should pay his own costs.

The 7th June 1873.

Present:

The Hon'ble Dwarkanath Mitter and E. G. Birch, *Judges*.

Hindoo Will—Spiritual Benefit—Maintenance.

Case No. 1261 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Cuttack, dated the 2nd April 1872, affirming a decision of the Moonsiff of Balasore, dated the 5th August 1871.

Rookmonee Debia and another (Plaintiffs)
Appellants,

versus

Krishno Churn Misser (Defendant)
Respondent.

Baboos Mohesh Chunder Chowdhry and Obhoy Churn Bose for Appellants.

Baboo Mohendro Lall Mitter for Respondent.

A will is not invalidated by the circumstance that another than the devisee is competent to confer a greater amount of spiritual benefit upon the testator: nor on the ground of its making no provision for the maintenance of the widow of the testator's deceased brother.

Mitter, J.—We are of opinion that this special appeal ought to be dismissed.

The first ground is that the will in question is not valid under the Hindoo law, inasmuch as the testator was at the time when he made it under the erroneous impression that the devisee was the fittest person to confer spiritual benefit upon him. No authority has been shown us by the pleader for the special appellant in support of this contention; and it is perfectly clear

that, under the Hindoo law, the devisee was a person quite competent to confer a certain amount of spiritual benefit upon the testator. It may be that the daughter's son was competent to confer a greater amount of spiritual benefit than the devisee, but that circumstance is not at all sufficient to invalidate the will.

The next ground is that no provisions having been made in the will for the maintenance of the widow of the deceased brother of the testator, the disposition ought to be set aside as invalid under the Hindoo law. With reference to this objection, it is sufficient to say that no authority has been shown us in support of it. Whether the widow of the deceased brother is entitled to sue the devisee for maintenance or not is a question upon which we need not express any opinion.

The last objection taken relates to the construction of the will, but on a perusal of that document we have no doubt that it was the intention of the testator to make the devisee his successor immediately after his death, and not to create a life-interest in favor of the widow and then to give the reversionary right to the devisee.

The appeal is dismissed with costs.

The 7th June 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Misjoinder—Special Appeal—Obscurity of Plaintiff.

Case No. 1304 of 1872.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 7th May 1872, reversing a decision of the Sudder Moonsiff of that district, dated the 3rd February 1872.

Mahomed Hosseini (Plaintiff) *Appellant,*

versus

Potun and others (Defendants) *Respondents.*

Baboo Aukil Chunder Sen for Appellant.

Mr. C. Gregory for Respondents.

Where an objection on the score of misjoinder is disallowed by the first Court, but rightly allowed by

the Lower Appellate Court, the fact that the latter Court holds the objection to be good is no ground of special appeal.

A Court is justified in refusing to give a decree upon a plaint which it deems to be intentionally indistinct and obscure.

Couch, C.J.—In this case the Moonsiff made a decree in favor of the plaintiff, which has been reversed on appeal by the District Judge, and the suit of the plaintiff has been dismissed. The ground upon which this has been done is stated by the Judge to be that the plaintiff does not set out clearly on what ground he claims the land, whether as part of the original leasehold or as a recent accretion. "The plaint," the Judge says, "seems to have been intentionally worded in the most obscure manner, and should have been at once returned for amendment;" and noting the evidence of the witnesses examined by the Moonsiff, he says, "the obscurity of the plaint becomes contradiction in the evidence of the witnesses."

He then goes on to say that the plaintiff brought the suit against some persons, all of whom objected that they had no community of interest, and that they were wrongly joined as co-defendants in a single suit. The Moonsiff disposed of the objection by saying that the plaintiff had alleged in his plaint that he had been dispossessed by them all, and that was sufficient; but the Judge holds that the plaintiff has not proved, as he alleged, a joint dispossession, and that the mere allegation of the plaintiff would not be sufficient to meet the objection which was made by the defendants that they were improperly joined in the suit. He concludes by saying:—"I think the plaintiff's suit should have been dismissed, because his plaint was obscure and indistinct, and because he wrongly joined as defendants a number of persons who clearly had no community of interest or of wrong-doing."

Although an objection that several persons are joined as defendants in a suit against whom there is no common cause of action, and that the causes of action are really separate, if taken for the first time in special appeal, or possibly in regular appeal, might not be allowed to prevail, here the objection was taken before the Moonsiff and was disallowed by him. The defendants had a right to appeal to the Judge against that decision, and there is no error in the Judge's holding that the objection was a good one. So far from that, his decision is

right and in accordance with the decisions of this Court and the law laid down by it. Therefore it can be no ground of appeal to this Court that he has held the objection to be a good one. If the plaint is so obscure as the Judge describes it to be (and as he thought, not accidentally but intentionally) the Judge was justified in refusing to give the plaintiff a decree upon it. Here again, instead of there being any error in his decision, it is a right one. There is a case in 2 B. L. R., App. Jur., page 341,* which supports him in the view which he has taken. Therefore in neither of the grounds upon which he has dismissed the plaintiff's suit is there any error. The appeal must be dismissed with costs.

The 7th June 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Remands—Jurisdiction—Act VIII of 1859
ss. 351 and 352.

Case No. 1628 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 27th July 1872, reversing a decision of the Moonsiff of Pursa, dated the 31st January 1871.

Lalla Shoobh Narain and another (Plaintiffs)
Appellants,

versus

Nursingh Narain (Defendant) *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboo Kalee Kishen Sen for Respondent.

The Lower Appellate Court has no power to remand a case, which has come before it on appeal, to the Court of first instance for a second trial, except where the first Court has decided the case upon a preliminary issue in such a way as to cause an absence of material

* 11 W. R., 273.

evidence bearing upon the issues on the merits between the parties.

Phear, J.—In this case, the Judge of the Lower Appellate Court has remanded the suit to the Lower Court in order that some parties should be added as parties defendant to the cause, should be summoned to file answer, and exhibit proofs as required by law. It was further directed by the Lower Appellate Court that "the Moonsiff will, after their answers duly filed, record appropriate issues with limit of period and means of possession of the parties, will receive additional evidence which the parties may desire to exhibit, and will duly decide the issue of limitation in bar together with the material issues on the merits of this suit."

The suit had been tried upon its merits in the first Court.

If there ever was a full and complete remand of the whole suit to be retried upon all its merits, it is this order of the Lower Appellate Court; and yet we have in Section 352 of Act VIII of 1859 this enactment—"It shall not be competent to the Appellate Court to remand a case for a second decision by the Lower Court, except as provided in the last preceding Section," *i. e.*, Section 351. And Section 351 provides that the Lower Appellate Court shall have power to remand the case in the event of the first Court having decided the case upon a preliminary issue in such a way as to cause an absence of material evidence bearing upon the issues on the merits between the parties. The effect of these two Sections is that in no other case than the case which we have just mentioned has the Lower Appellate Court power to remand the case which comes up before it on appeal to the Court of first instance for a second trial. It is very clear that the remand order which has been made in the case before us is illegal, and must be set aside.

The case must be sent back to the Lower Appellate Court to be tried upon its merits.

Costs will abide the event.

The 7th June 1873.

Present :

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

Vendor and Vendee—Refund of Purchase-money.

In the matter of
Ram Mohun Dey, *Petitioner,*

versus

Kangalee Gopee and another, *Opposite Party.*

Baboo Debendro Narain Bose
for Petitioner.

Baboos Bykunt Nath Dass and Gour
Churn Roy for Opposite Party.

Where a sale was set aside on the suit of the preferential heir, and both vendor and vendees appealed, but separately, the Judge, on the appeal of the vendees, in which the vendor was not made a respondent, ordered the latter to refund the purchase-money to the vendees:

Held that the decision was illegal and that the vendees should have been referred to a separate suit.

Kemp, J.—We think this rule must be made absolute. It is clear that the petitioner before us, Ram Mohun, claimed as the preferential heir of Ram Chunder Mojomdar. He sued to set aside a sale made by the daughter of Ram Chunder Mojomdar, Beebee Shomitra, to a third party, and that sale was set aside. Chunder Mohun Dutt Biswas then sued Ram Mohun, the petitioner, as well as his vendees, Kangalee and Gopee, alleging that he, Chunder Mohun Biswas, was the preferential heir of Ram Chunder Mojomdar. Ram Mohun and his vendees defended the suit on one common ground, namely, that Ram Mohun was the preferential heir of Ram Chunder. The Moonsiff decreed in favor of Chunder Mohun, and against his decision there were two appeals; one by Ram Mohun, and the second by his vendees. On the second appeal by the vendees, their vendor Ram Mohun was not made a party. The Judge upheld the decision of the first Court, but on the appeal of the vendees directed Ram Mohun, who was not made a respondent, to refund the purchase-money to Kangalee and Gopee with interest at 12 per cent. per annum. We think this decision was illegal, and that the vendees should have been referred to a separate suit. We therefore quash the decision of the Judge.

Each party to pay their own costs.

The 9th June 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Execution—Certificate of Satisfaction—Liability
of Judgment-Creditor.*

Case No. 69 of 1873.

*Miscellaneous Appeal from an order
passed by the Subordinate Judge of
Purneah, dated the 8th February 1873.*

Meer Mahomed Kazem Jowhurry (Opposite
Party) *Appellant*,

versus

Khetoo Bebee (Decree-holder) *Respondent*.

Baboo Kumla Kant Sen for *Appellant*.

Baboos Kalee Mohun Doss, Nil Madhub
Bose, and Jadub Chunder Seal for
Respondent.

Where a payment alleged to have been made in satisfaction of a decree is not certified to the Court executing the decree, the Court is bound to proceed as if such payment had never been made.

If such payment has in fact been made to the judgment-creditor, and he dishonestly refuses to certify it to the Court when called upon to do so, he can be made liable to refund it in an action.

Phear, J.—We think it is clear, as the case stands, that the judgment-creditor has not certified to the Court the payment of a certain portion of a sum of Rs. 4,250, which, the judgment-debtor now alleges, was made in satisfaction of the decree, nor has anything been brought before the Court which the Court ought in equity and justice to take as equivalent to a certificate of that kind. Under these circumstances, it is quite plain that, under the operation of Section 206 of the Civil Procedure Code, the Court could not take any notice of the alleged payment, and was bound to execute the decree as if that payment had never been made.

As to the portion of Rs. 4,250 which is not admitted, this decision does not conclude the judgment-debtor, for it is now pretty well settled that if payment of that kind has in fact been made to the judgment-creditor, and he dishonestly refuses to certify it to the Court when called upon to do so, he can be made liable to refund it in an action.

The appeal is dismissed with costs.

The 9th June 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Charles Pontifex,
Judge.

*Equitable Mortgage—Parol Agreement—Promissory Note—Registration—Act XX of 1866,
s. 17.*

*On appeal from the judgment of the
Hon'ble A. G. Macpherson, exercising
the ordinary original civil jurisdiction
of the High Court.*

Kedarnath Dutt and another (two of the
Defendants) *Appellants*,

versus

Sham Lall Khettry (Plaintiff) *Respondent*.

Mr. Kennedy and *Mr. Evans* for the
Appellants.

Mr. Montrou and *Mr. Branson* for the
Respondent.

Plaintiff made an advance of money to B on the deposit of the title-deeds of property belonging to the latter, which title-deeds were obtained by plaintiff in the morning on an agreement which was not then reduced to writing. In the evening a writing was made over to plaintiff, in which B promised to pay him a sum specified, with interest, for value received in cash. It bore an endorsement depositing as collateral security the title-deeds in question by way of equitable mortgage. Plaintiff sued for a declaration that he held a valid equitable mortgage and for an account to be taken. The High Court, in its original side, held that the transaction was complete in the morning when the money was paid, and the equitable mortgage completed. It was objected in appeal that the memorandum endorsed on the promissory note ought to have been registered under the Indian Registration Act of 1866:

Held that the memorandum was not the instrument by which the equitable mortgage was created, nor was it the evidence of the contract, and therefore it did not come under s. 17 of the Registration Act. The equitable mortgage was created by the agreement which was evidenced by the loan and the deposit of the title-deeds.

The judgment appealed against was as follows:—

I AM of opinion that the transaction was complete in the morning. The money was paid, and the equitable mortgage was complete then on the deeds being deposited. It was none the less complete because the defendant Wooma Churn Banerjee agreed to return and give a writing, and did return and do so.

The defendant appealed from this judgment on the following grounds:—

1st.—The plaintiff in his plaint claimed to be an equitable mortgagee of land under an equitable mortgage, the terms of which were contained in a certain unstamped and

unregistered writing in the plaint set forth, yet the learned Judge erroneously allowed the plaintiff to set up an alleged parol agreement with deposit of title-deeds, and gave him a decree upon such alleged parol agreement.

2nd.—The learned Judge erroneously received parol evidence of an agreement in writing, whereas he ought not so to have done.

3rd.—The plaintiff admitted that the terms of a certain alleged agreement, being the agreement sued on, had been reduced to writing, and that such writing had been given to him, and the plaintiff did not deny that the same was still in his hands, and the learned Judge thereupon erroneously allowed the plaintiff to give parol evidence of the terms of such agreement.

4th.—The admission of such evidence was contrary to the provisions of the Indian Evidence Act I. of 1872, and contrary to the policy of the Stamp and Registration Acts.

5th.—No legal evidence exists in the record of the terms of the alleged mortgage, yet the learned Judge decreed a sale thereon.

6th.—For that the learned Judge ordered these defendants to pay the whole costs of the suit.

7th.—The said judgment and decree are in other respects erroneous, and ought to be reversed.

Mr. Kennedy for the appellants.—The terms on which these title-deeds were deposited with the respondent were reduced into writing, and are contained in the endorsement on the back of the promissory note. The contract must be proved by that writing, and under Section 91 of Act I of 1872, no evidence of the terms on which those deeds were deposited is admissible other than the endorsement on the note. That document ought to have been registered as it falls within the class specified by Section 17 of the Registration Act of 1866, it being an instrument purporting to create an interest in immoveable property. [*The Chief Justice*.—Was not the plaintiff entitled to say that there was a complete equitable mortgage on the deposit of the title-deeds and the payment of the money, and that he was seeking to enforce that claim?] The deposit of the title-deeds was one of a series of acts which were completed on the making of the promissory note and the endorsement on the back of it. [*The Chief Justice*.—*Mr. Justice Macpherson* finds that the deeds were deposited and the money paid in the morning, and that the transaction was then completed.] The plaintiff claims 24 per cent,

and therefore refers to the note as his contract. [*Pontifex, J.*—*Tuckley vs. Thompson*, 1 Johnson & Hem., 126, was a case of equitable mortgage with a claim for interest, and there was no memorandum of the deposit.] There was something further done in this case; there was a memorandum of the deposit of the title-deeds, and such a document ought to be registered. In *Neve vs. Pennell*, 2 Hem. & Miller, 170, it was held that a deposit of title-deeds of lands in Middlesex to secure the payment of a debt, containing a provision that a legal mortgage should be given on demand, was a document requiring registration under Act 9 Anne, c. 10, since it was an instrument affecting land. In *Sumpter vs. Cooper*, 1 B. & Ad., 223, there was no instrument to register, and that case is no authority in the present instance. [*Pontifex, J.*—In *Meek vs. Bayliss*, 31 L. J., Ch., 448, it was held that a memorandum stating the purpose for which title-deeds were deposited was held not to be an agreement requiring a stamp.] Here the memorandum contains the words "I hereby deposit," and is clearly meant to be the proof of the contract by which the parties bound themselves, and such an instrument requires registration, and cannot be received in evidence as it is not registered (*Fate Chand Sahee vs. Lilamber Sing Dass*, 9 B. L. R., 433).*

Mr. Montrion for the respondent.—The plaintiff relied on the possession of the title-deeds as his security for the repayment of the money advanced, and by that deposit an equitable mortgage was created, and that security has not been cut down. The endorsement on the back of the note speaks of the title-deeds being deposited as "collateral security," but it must be remembered that this was a transaction between Bengalees, and they were using a language foreign to them. Their acts show what was the real transaction between them. The endorsement on the promissory note is not such a document as would require registration under Section 17 Registration Act of 1866.

Mr. Kennedy was heard in reply.

The judgment of the Appellate Bench was delivered as follows by—

Couch, C.J.—This is a suit in which the plaintiff prayed that it might be declared that he held a valid equitable mortgage on certain premises mentioned in the plaint, and that an account might be taken of what was

* 16 W. R., P. C., 26.

due and owing to him as equitable mortgagee in respect of a loan made by him to the defendant Wooma Churn Banerjee. The premises upon which he asked it might be declared that he had an equitable mortgage belonged to Wooma Churn Banerjee, and had been purchased by the defendants Kedarnath Dutt and Madhub Chunder Bose under an execution against Wooma Churn Banerjee, and it is said, with notice, at the time of the sale, of the claim of the plaintiff.

The evidence of the plaintiff, who was the only witness examined, was that he made an advance of money to Wooma Churn Banerjee on a deposit of the title-deeds of property belonging to him situated in Mirzapore; that Wooma Churn Banerjee having been to him several times before, the plaintiff told him if he could give him a deposit of title-deeds, or security of that sort, he could advance him the money; that Wooma Churn said he had landed property and the title-deeds of it, and would give them to him. The witness then said, "He" (Wooma Churn) "continued, I will place them as deposit with you, and also give you a note of hand. He brought me title-deeds on that same day, 16th Cheyt 1271, not quite two years ago. He brought me the title-deeds at 8 o'clock in the morning. That was the occasion he received and took the money away having brought the deeds. Before that, a pucca arrangement had been come to between me and him. It was not then reduced into writing. A writing was made when I paid the money, that same day at 6 o'clock in the evening. I gave him the money at 8 o'clock in the morning, actually before the writing took place. I got the title-deeds from him at 8 o'clock in the morning before I gave the money." The year 1271 in the note of the evidence must be a mistake, as that would be 9 years ago. The time is shown by the promissory note to be the 29th of March 1871. He then said that he saw him again at 5 o'clock in the evening, and he then gave him a document which bears his signature. It is set out in the plaint, and is a promissory note dated the 29th of March 1871, whereby Wooma Churn Banerjee promised "to pay to Sham Lal Khettry or order the sum of Rs. 1,200 with interest at the rate of 24 per cent. per annum for value received in cash." It bears an endorsement in these words:—"For the repayment of the loan of Rs. 1,200, and the interest due thereon of the within note of hand, I hereby deposit with Baboo Sham Lal Khettry as a collateral security by way of equitable mortgage title-deeds of my

property situate at No. 11 in Fucker Chund Mitter's street at Mirzapore in Calcutta." "Wooma Churn Banerjee."

Mr. Justice Macpherson, by whom the case was tried, gave a very short judgment, saying he was of opinion that the transaction was complete in the morning. He says:—"The money was paid, and the equitable mortgage was completed *then*, on the deeds being deposited. It was none the less complete because the defendant Wooma Churn Banerjee agreed to return and give a writing, and did return and do so."

We do not entirely agree in the view which the learned Judge took of the evidence of the plaintiff. We rather think that the transaction was not completed until the promissory note was given, and that the plaintiff's evidence to the contrary is probably not true; but, in the view we take of the question, it is not material to determine whether there was a complete equitable mortgage before the promissory note was given, or whether that was the completion of the transaction.

It was objected that the memorandum, which I have read, ought to have been registered under the Indian Registration Act of 1866; and as it had not been, it could not be received in evidence, and consequently the plaintiff could not establish his equitable mortgage.

The words of the Act upon which the objection is founded are in Section 17, the second clause of which enumerates, amongst the instruments which shall be registered "instruments, other than an instrument of gift, which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right title or interest, whether vested or contingent, of the value of 100 rupees and upwards to or in immoveable property."

Section 21 of the same Act requires that no instrument relating to immoveable property shall be accepted for registration unless it shall contain a description of the property sufficient to identify it. In fact, if this memorandum had been presented for registration, it must have been rejected. Although the transaction is of a description which is usual with merchants, and an immediate advance of money is required, if the charge upon the property is made by a written instrument, care must be taken to describe it accurately. It is not unlikely that many instruments may be defective on that account. But that cannot be allowed to affect the construction of the Act.

If this instrument came within Section 17, it was the duty of the parties to see that it contained what Section 21 requires.

Is the memorandum which I have read an instrument within the meaning of the words in Section 17?

Was there not a valid equitable mortgage independently of it?

The nature of an equitable mortgage is well known. But as we are discussing the matter with reference to the Registration Act, it may be well to refer to what Lord Eldon says about it in *ex parte Wright*, 19 Ves., 258. He says that the deposit of title-deeds is evidence of an agreement for a mortgage: and an equitable title to a mortgage, that is, the title created by the agreement, is, in a Court of Equity, as good as a legal title.

Hence the way in which Courts of Equity gave effect to a deposit of title-deeds. It is true that this doctrine has been questioned by some Judges, but it has been upon a ground which would not be applicable to a case like the present. It would not be applicable to a great majority of transactions in India, the ground being that it appeared to be opposed to the Statute of Frauds which required a writing where any interest in land was transferred. And although objections have been made to the doctrine on that account, it has been constantly acted upon in the Courts in England, and must be considered as fully established. As Lord Abinger said in *Keys vs. Williams*, 3 Y. & C., 61, it appears to have arisen from the necessity of the case. "It may, however, in many cases, operate to useful purposes, and is certainly not injurious to commerce. In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title-deeds, and preparing the mortgage. Expediency, therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute."

Many cases in the English Courts might be referred to as showing how the doctrine is acted upon. But it is enough to notice the case which was quoted to us in the course of the argument, *Neve vs. Pennell*, 2 Hemming & Miller, 170, where, as to one of the sums of money claimed, the £3,000 which was an advance made at the time the title-deeds were deposited, no question was raised as to the validity of the mortgage.

The question in the case was raised with reference to the sum of £4,000, which was

subsequently advanced, and as to which it was necessary to have some writing in order to show that the title-deeds, which had been deposited, and were in the hands of the equitable mortgagee, were to be a security for that sum. The case shows how entirely the doctrine of equitable mortgage was treated as established. Then what we have to consider is, did the memorandum which was endorsed on the promissory note make any difference in the transaction?

The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created and would come within Section 17 of the Registration Act. But it was not a writing of that character. As I have said, the equitable mortgage was created by the agreement which was evidenced by the loan and the deposit of the title-deeds. The promissory note, whether given either at the same time or some hours afterwards in pursuance of the understanding between the parties, was evidence of the terms upon which the loan was made, *viz.*, that the interest should be at the rate of 24 per cent.

But as regards the contract between the parties if there had been no memorandum at all on the promissory note, there would have been a complete equitable mortgage. When we consider what the memorandum is, we find it is not the contract for the mortgage—not the agreement to give a mortgage for the Rs. 1,200—but nothing more than a statement by Wooma Churn Banerjee of the fact from which the agreement is inferred. It is an admission by him that he had deposited the deeds upon the advance of the money for which the promissory note was given. It is not by the memorandum that the Court takes the agreement for the mortgage to be proved, but by the deposit of the deeds. This is no more than a piece of evidence showing the fact of the deposit which might be proved by any other evidence. The memorandum need not have been produced.

That this is the nature of such a memorandum as this appears from a decision of the Court of Queen's Bench in the 1st Queen's Bench Reports. Of course, I refer to this decision more as an illustration of what I have been stating than as an authority which binds us. We are to determine what is the law under the Registration Act. But this decision illustrates what I have been saying about this memorandum.

The question arose there not upon a Registration Act, but on the Stamp Act; but the reasoning of the Court is equally applicable.

It is the case of *Blackwell vs. M'Naughtan*, p. 127.

The action was upon a contract to redeliver, on request, wine which had been placed in the defendant's care. The plaintiffs offered in evidence a writing signed by the defendant, which was in substance as follows:—"This is to certify that Mr. M'Naughtan has in his cellar, belonging to Mrs. Hartley, that is paid for, twelve dozen of port wine; March 5th, 1823."

It was objected that this writing was not admissible without a stamp. The late Chief Baron, Sir Frederick Pollock, in moving for a new trial, argued that it was evidence of a contract, and ought therefore to have had an agreement stamp. Lord Denman, the Judge who had tried the case, said:—"I thought the certificate was not proof of a contract, but proof of an independent fact from which, among others, a contract might be inferred, if the case were sufficiently made out." Mr. Justice Coleridge said, "this writing was merely evidence of a fact from which the plaintiffs sought to infer a contract," which is precisely the case here. The result was that the Court refused the rule for a new trial, and upheld the decision of Lord Denman, who read the judgment of Lord Pentherden in *Mullet vs. Huchison*, 7 B. & C., 639.

On the ground, therefore, that this was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred, I think it does not come within the description of documents in the 17th Section of the Registration Act.

A decision of Mr. Justice Phear in the 7th B. L. R., 55, was quoted, which, I think, is distinguishable from the present case. In that case the facts appear to have been similar to what they were in *Neve vs. Pennell* in regard to the sum of £4,000. The letter which Mr. Justice Phear held to

require registration, as being a document creating a charge on land, was written after the debt had been incurred and was sent with the title-deeds. There was not in that case that which was evidence of an agreement to give a mortgage, namely, the loan of the money accompanied by the deposit of the title-deeds. Without some letter or verbal communication there would have been nothing to attach the debt which had been incurred to the deposit of the deeds. It seems to me that the decision is distinguishable from the present case, and that, for the reasons I have given, we ought to hold that the decision of Mr. Justice Macpherson is right, and that this appeal should be dismissed. The appeal is dismissed with costs on scale 2.

Pontifex, J.—I concur.

The 6th June 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

*Ghatwalee Tenures—Female Succession—
Impartible Estates—Partition.*

Case No. 63 of 1872.

*Regular Appeal from a decision passed by
the Subordinate Judge of Bhaugulpore,
dated the 29th December 1871.*

Teknet Doorga Pershad Singh (Plaintiff)
Appellant,

versus

Teknetnee Doorga Koorree and another
(Defendants) *Respondents.*

The Advocate-General and Messrs. J. T. Woodroffe and R. T. Allan, and Baboos Mohesh Chander Chowdhry, Chunder Madhub Ghose, and Boodh Sen Singh for Appellant.

Messrs. G. H. P. Evans and R. E. Twidale, and Baboos Unnoda Pershad Banerjee, Ramesh Chunder Mitter, Nil Madhub Bose, Luckhee Churn Bose, and Hurechur Nath for Respondents.

A ghatwalee estate is not necessarily held by males to the exclusion of females.

From the fact of an estate being impartible, it does not follow as a necessary consequence that no division

or separation can be effected with respect to it. A descended impartible estate may be held separately after separation from the other members of the family.

Pontifex, J.—THE plaintiff, who is also the appellant in this case, instituted a suit for possession of certain property as an impartible raj and in accordance with koolachar or family usage.

The plaint does not describe the property as ghatwalee, but in the schedule thereto part of the property claimed is described as such.

The only documents of title which appear in the record as relating to the property are the sunnud dated the 8th September 1787 and a kubooleut dated the 28th October 1788. Both these documents were filed by the defendant.

The sunnud comprises Talooka Chakai and Talookas Sunkhara and Ghotia, and appears to have been granted to one Mut Narain Singh, five generations removed from Gurubh Narain Singh, the last proprietor. It certainly contains conditions which would be appropriate to a ghatwalee holding.

The kubooleut was given by Dhurm Narain Singh, the son of the grantee under the sunnud, and it refers only to Talookas Sunkhara and Ghotia, and contains no reference to Chakai.

In each instrument, the holder of the property is described as a ghatwal.

The schedule to the plaint includes not only Chakai, Sunkhara, and Ghotia, but also what is described as one-third of the Ghatwalee Mehal Chundunee and the entire Ghatwalee Mehal Nawa Deep.

Speaking for myself I am inclined to believe that part only of the property in suit is ghatwalee, and that such part must originally have been granted to the owner of the rest of the estate. But the case has been argued by the appellants on the assumption that the entire estate was originally ghatwalee, and it is upon that assumption that this decision rests.

The suit was instituted under the following circumstances :—

Futteh Narain Singh, the fourth in descent from the person to whom the sunnud was granted, died on the 18th of April 1863, leaving three widows, one of them being *enceinte*. A posthumous son was born in July 1863, who died in April 1865. The principal defendant Doorga Kooeree was the mother of such posthumous son.

After Futteh Narain Singh's death, and before the birth of his son, his three widows immediately applied to the Collector for the registration of Futteh Narain's estate in their names. Upon this application, the plaintiff in the present suit intervened by a petition dated the 21st of May 1863, alleging in effect that it was the prevailing usage of the family that no female could succeed to the estate, and stating that the petitioner and Nagur Singh and Hurnauth Singh "were according to our family usage ready to effect mutation of names," and that the application by the widows was adopted to "deprive me of my rights."

• Upon this application, the Collector made an order dated the 3rd of July 1863, stating that no witness or evidence was produced on behalf of the objector, and directing the estate to be registered in the names of the widows.

The subsequently born son died, as already stated, in April 1865. During his lifetime the estate continued registered in the names of the three widows.

On the 6th November 1868, the principal defendant in the suit, who was the mother of the posthumous son, filed a plaint against the other two widows as first party defendants, and against the present plaintiff as second party defendant, asking for the expunction of the names of the two childless widows, and in effect that she might be declared entitled to the entire estate as heiress of her deceased son. The present plaintiff was made a defendant to that suit on the allegation that he was colluding with the other two widows to dispossess Doorga Kooeree from two-thirds of the estate.

In that suit, the present plaintiff, by his written statement, insisted that the property being ancestral and he having lived in commensality with Futteh Narain, he was entitled under Mitakshara law to the ancestral estate. He further stated that he was installed as heir on the 13th of Jeyt 1274 with the consent of all three widows, and that "since that date he had been in possession of all the mouzahs in suit."

In such written statement, he does not pretend to have entered into possession in April 1865, when, if he was the true heir, his right to possession would have accrued, nor does he set up any question of koolachar or family usage, or any question of local custom entitling him to resist the suit.

Accordingly, in that suit no issue was raised as to koolachar, or family usage, governing inheritance, but issues were raised whether

the present plaintiff lived as a member of a joint family with Futteh Narain, and whether the property was ancestral property of Futteh Narain and Doorga Singh.

But although there was no issue raised in that suit as to koolachar, the present plaintiff did adduce oral evidence to prove what he alleged to be the family usage that no female could succeed. Such evidence was, however, extremely slight, and seems to have confused what was called family usage with succession under the Mitakshara law.

On the 23rd of March 1869, the Subordinate Judge of Bhagulpore made a decree in favor of Doorga Kooeree, and decided that the present plaintiff, "Doorga Singh, was never joint in food or estate with Futteh Narain, and that he has no right to the property left by Futteh Narain by survivorship."

The Judge also alluded to the attempt to raise the question of koolachar by the evidence of the witnesses; but he refused to enquire into that question as it had not been set up by the written statement.

Against this decision the present plaintiff appealed to the High Court, and such appeal was dismissed on the 5th of January 1870.* In the judgment by the appeal Court, reference is made to his attempt to set up the question of koolachar by the evidence of his witnesses; but as the question was not raised by his written statement, as no issue was raised in it, and as the present defendant had had no opportunity of meeting such question, the appeal Court declined "to go into the question whether upon the evidence as it stands, there is any proof of the existence of any such custom."

By neither of these judgments was a right reserved to the present plaintiff to raise the question of koolachar by another suit.

Under these circumstances, the plaintiff instituted this suit on the 26th December 1870, relying on koolachar or family usage, but also stating in his plaint that the same usage obtained in the neighbouring zemindarees whose proprietors were of the same tribe and class.

The principal defendant, who was the plaintiff in the original suit, resisted the present suit under the plea of *res judicata*.

Issues were raised as to the koolachar, and evidence was taken thereon both for and against.

The Subordinate Judge, on the 29th of December 1871, dismissed the suit as

res judicata, but declared in effect that the plaintiff as a reversioner was competent to raise the question of inheritance on the death of the principal defendant.

From this decision the plaintiff appealed, on the ground that the koolachar not having been put in issue in the former suit, and the Court which decided that case having declined to adjudicate the question of koolachar, the decision in that case could be no bar to the present suit.

The defendant's Counsel before us insisted that the suit was barred on the principle enunciated by Lord Westbury at page 73 of XI Moore's Indian Appeals:—"When a plaintiff claims an estate, and the defendant, being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward."

Inasmuch, however, as in the earlier suit, the plaintiff had raised the question of koolachar, although after the proper time for raising it, and as the judgments of both Courts in that suit noticed the fact that the point had been raised, but declined to adjudicate upon it, we thought that the plaintiff ought to be let in now to argue the question of koolachar.

Whether we were right in so deciding is at least doubtful, regard being had to the observations at pages 548-549 of the 13th Volume of Moore's Indian Appeals;† and to the extreme importance of observing strictly the principle stated by Lord Westbury; but as some doubt attached to this particular case, we considered it better to overrule the objection. Admitting the plaintiff to prove the koolachar, we by no means intended that it should be open to him either to set up a title of local custom, or of right of inheritance under the Mitakshara as in an undivided family, which latter question had been adjudicated upon in the former suit. We have had, however, the whole of the evidence read to us and have heard the arguments of the plaintiff's Counsel on both the above points.

We are of opinion that no family usage, or koolachar, either excluding females or giving the preferential right of succession to direct descendants in the eldest male line, has been proved.

Nearly the whole of the instances adduced by the witnesses as proof of koolachar must

* 13 W. R., 10.

* 6 W. R., P. C., 50.

† 15 W. R., P. C., 10.

be referred to succession to undivided estate under Mitakshara law.

Only three members of the family have been examined, *viz.*, Durbijoy Singh, Parusnath Singh, and Pertabnarrain Singh. The two first witnesses can only mention one instance of a woman being excluded from inheritance, and they say that was on the occasion of the death of Hira Singh, who left two widows, and who lived two generations earlier than the date of the sunnud proved in the suit. The source of their information is very obscure, and it is even doubtful whether the widows were in fact passed over; for the second witness says:—“Hira Singh died previous to the British rule. I have heard that the widows of Hira Singh abandoned the guddee to Dhura Singh according to the prevailing usage.” But as this is the only known instance of the usage in the family, there seems to be no foundation for his reference to the prevailing usage. If the widows of Hira Singh did in fact allow a male relative to succeed their husband, that instance might very well be accounted for by the uncertainty attending the introduction of British rule which, according to the evidence, appears to have occurred at that period.

The third witness admits that no one in his own particular family had died childless, and states that he does not know whether any owner of the property in suit had died childless; and by the word childless, he clearly meant without a son.

Two other witnesses, Oodoy Narain Singh and Roop Mungul Singh, who are connected by marriage with the family, depose to the same effect and with the same vagueness.

In fact, all the witnesses rely principally on local custom as applying to Sooruj Bunsee Rajpoots. But the evidence shows that in Pergunnah Parra, a ghatwalee zemindaree in Beerbhoom held by Sooruj Bunsee Rajpoots, a woman had succeeded.

We are of opinion that the evidence fails to prove any family or local custom excluding the succession of females, and also fails to prove a koolachar or local custom, whereby the succession goes otherwise than under the ordinary Mitakshara law as applied to impartible estates, under which it is admitted that the plaintiff would not, under existing circumstances, be the next reversioner, inasmuch as there are at least two persons who would be preferential heirs to him. With respect to local custom, even if the plaintiff were entitled to raise that question in this case, which we think he is not, we are of

opinion that there is no defined district pointed out over which the alleged custom extends. To prove a local custom, the evidence must be precise and conclusive (IX Moore's Indian Appeals, pages 450-451; * IX Bengal Law Reports, page 297†); but in this case the plaintiff's evidence shows that, when an estate subject to the alleged custom is alienated, it thenceforth descends according to the ordinary law; which fact alone is sufficient to show that no local custom exists.

It was endeavoured on behalf of the plaintiff to show that female succession was inherently inconsistent with a ghatwalee estate. We do not think this point is open to the plaintiff as against the present principal defendant, as he did not raise the question in the former suit. But having regard to the plaintiff's own evidence, which shows that many ghatwalee estates in Beerbhoom are held by females, and to the fact stated at page 126 of the 6th Volume of Moore's Indian Appeals that Ranees Surbessuree had held the office of ghatwal, and to the case at page 39 of the gap number of Sutherland's Weekly Reporter, it would, we think, be difficult to hold that a ghatwalee estate must necessarily be held by male to the exclusion of females.

An attempt was also made to rest this case upon the ultimate decision in the case reported at page 274 of the 9th Volume of the Bengal Law Reports.†

Even if that decision governed this case, it would not support the plaintiff's title without the aid of a family custom carrying the estate in the senior direct male line.

But the decision in that case rests entirely (page 323) upon the fact of the family then living undivided; whereas in this case the prior decisions as between the parties establish that the plaintiff was never joint in estate with the last proprietor.

It was argued indeed that, from the fact of an estate being impartible, it followed as a necessary consequence that no division or separation could be effected with respect thereto.

But if this was so, it would be impossible for any proprietor to alienate the estate without the concurrence of every possible heir descended from the common ancestor; and in this case they would be legion, as

* 10 W. R., P. C., 17.

† 17 W. R., 316.

according to the plaintiff's table there were no less than ten descents from Juggut Singh, the common ancestor; but that this is not a necessary consequence would seem clear from the observations at page 589 of IX Moore's Indian Appeals,* which show that a descended impartible estate may be held separately after separation from the other members of the family.

There are certain proceedings in these suits having a reference to the alleged family custom, on which we do not in any way rely, but to which we think it right to draw attention.

It will be recollected that in his petition of the 21st May 1863 to the Collector with respect to the registration of the estate, the plaintiff referred in an indefinite vague way to Nagur Singh and Hurnauth Singh who, it is admitted, would, under Mitakshara law, pure and simple, be preferential heirs to himself to an impartible estate.

It appears that, in the first suit, petitions were presented on behalf of Nagur Singh and Hurnauth Singh, dated respectively the 13th March 1869, copies of which have been filed by the principal defendant in the present suit. Each of these petitions admits the title of the principal defendant for her life, and claims that, upon her death, the petitioners have equal title with the present plaintiff as admitted by him in his petition for mutation of names.

It appears upon the record that Nagur Singh was cited as a witness by the principal defendant, but was not examined. Her first witness, Ahlad Pandey, states that Nagur Singh had colluded with the plaintiff; and her sixth witness, Rung Lall, states that Nagur Singh had gone to the lodging of Doorga Singh. It is a circumstance for observation that neither Nagur Singh nor Hurnauth Singh were examined, regard being had to the fact of the existence of the petitions alleged to have been presented by them in the earlier suit, and of which the plaintiff must have had notice.

But in deciding this case, we place no reliance whatever on those petitions, because they were not filed in this suit until six months after the evidence closed, and in fact only the day before the Subordinate Judge pronounced his decision.

For the other reasons stated, we dismiss the plaintiff's suit with costs in both Courts.

* 2 W. R., P. C., 31.

The 6th June 1873.

Present :

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

*Joint Family—Acquisition of Property—Onus
Probandi.*

Case No. 1074 of 1872.

*Special Appeal from a decision passed by
the Subordinate Judge of Sylhet, dated
the 2nd April 1872, reversing a decision
of the Moonsiff of Lushkorpore, dated
the 22nd November 1871.*

Pran Kristo Mojoomdar and others
(Plaintiffs) *Appellants,*

versus

Sreemutty Bhageerutee Gooptia and others
(Defendants) *Respondents.*

*Mr. M. M. Ghose and Baboo Debendro
Narain Bose for Appellants.*

*Baboo Mohinee Mohun Roy and Kalee
Kishen Sen for Respondents.*

Where a family is joint, and there is a nucleus from which property may be acquired, the presumption is that property acquired by any member is joint property, and the *onus* is with those who allege that it is self-acquired.

Kemp, J.—RAM GOBIND and Gopal Kristo, who are respectively the ancestors of the plaintiffs and defendants, lived joint in mess and estate. This is admitted. It is also admitted that no separation of the family took place until the year 1273. The plaintiffs allege that after the separation in 1273, the defendants having concealed the fact of the existence of the *hibba* (which will presently be alluded to) fraudulently, in the year 1274, withheld possession from them of the property in suit. The plaintiffs, therefore, making this ouster of 1274 their cause of action, have brought this suit for possession of an eight-anna share of the disputed property. The defendants allege that their ancestor Gopal Kristo, who was the nephew

of Ram Gobind, acquired this property by gift on the 9th of Aughran 1250 from Shumboo Chunder Doss, the maternal uncle of Gopal Kristo.

As the Court below has taken a different view of this case, and as the argument before us has been a very lengthy one, the pleaders of the parties reading a considerable portion of the evidence, it will be necessary to give the particulars connected with this case. The *hibba* is dated, as already said, on the 9th of Aughran 1250. It recites that Gopal Kristo was the son of the uterine sister of the donor, and that, with the exception of Gopal Kristo and Koroona, the daughter of the donor, the donor had no other heirs. It then goes on to say that the donor being in want of money to pay the debts of his mother-in-law, as also to defray the expenses of his pilgrimage to Gya to perform the *shroddh* of the donor's father, mother, father-in-law, and mother-in-law, took Rs. 200 from Gopal Kristo, and made over to him certain property recited in the deed for that consideration; certain other properties are reserved in the deed for Koroona in case she should have male issue.

There has been considerable contention as to whether this document is a deed of gift or a deed of sale. It is contended for the defendants (special respondents before us) that it is a deed of gift, and therefore no presumption of the Hindoo law respecting a joint family will apply. On the other hand, it is contended for the plaintiffs that it is not a deed of gift, but a deed of sale. Now it is very clear that the parties claim through the *hibba* whether it be a deed of gift or sale. It is also clear that but for the consideration of the Rs. 200, this deed would not have been executed at all. It may be, and doubtless is the case, that this property was sold to Gopal Kristo for a very small consideration, and this may be owing to the near relationship of the parties. Be that as it may, there can be no doubt that this deed must be treated as a deed of sale. It recites that the alienor was in want of money, and that he had no other means of raising the money but by sale of this property.

We now come to the consideration of the case as treated by the Lower Courts. The first Court, the Moonsiff, treated the *hibba* as a deed of sale, and finding that there was according to the admission of the pleader of the defendant joint property in the possession of the parties, or in other words a nucleus from which this property could have been

acquired, placed the onus of showing that it was self-acquired property upon the defendants. The Moonsiff, for the reasons given in his judgment, found that this property was joint property. The Subordinate Judge on appeal has reversed the order of the Moonsiff, and thrown the onus entirely upon the plaintiff. In one part of his judgment the Subordinate Judge says:—"The plaintiffs have totally failed to adduce any evidence whatever to show that the sum of Rs. 200 mentioned in the *hibba* was paid from the *ijmalee* funds." Of course, if the onus was on the plaintiffs, this would be correct; but if the onus was on the defendants, it was for them to show that the Rs. 200 mentioned in the deed was not paid from the joint funds of the family. Where a family is joint, and it is admitted that this family was joint at the time the deed was executed, and it is also admitted that there was a nucleus from which this property could have been acquired, then the presumption clearly is that the property is joint, and the onus is upon the defendant to show that this was self-acquired property. Therefore the Subordinate Judge is clearly wrong in throwing the onus upon the plaintiffs; and this is one of the main grounds of special appeal.

Then we have the fact that this very property, amongst other properties of considerable extent, was attached for the payment of the joint debts of the family, and that those debts were liquidated from the joint family property without any objection on the part of the defendants that any portion of the attached property was self-acquired. We have also the fact that the Subordinate Judge has in more than one instance, in considering the depositions of the plaintiff's witnesses, especially that of Ram Kishen Surma, wholly misconstrued the oral evidence in this case. Ram Kishen Surma, as stated by the Subordinate Judge, does not say that Shumboo Chunder, the donor, gave the *hibba* exclusively to Gopal Kristo in consideration of his being his sister's son.

The onus, as already said, being upon the defendants to show that the consideration money of Rs. 200 was paid by them from self-acquired funds, and not out of the joint funds of the family, and they having given no evidence as admitted by both the Lower Courts on that point, we must uphold the decision of the Court of first instance, reverse that of the Subordinate Judge, and decree this appeal with costs.

The 7th June 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Hindoo Law—Joint Family Dwelling—User.

Case No. 1661 of 1872.

*Special Appeal from a decision passed by
the Subordinate Judge of Gaya, dated the
3rd September 1872, reversing a decision
of the Moonsiff of that district, dated
the 8th January 1872.*

Sheo Pershad Sing (Defendant) *Appellant,*

versus

Leelah Singh and others (Plaintiffs)

Respondents.

*Messrs. J. T. Woodroffe and R. T. Allan,
and Baboos Kalee Mohun Doss, Mohesh
Chunder Chowdhry, Chunder Madhub
Ghose, and Hureehur Nath for Appellant.*

*Messrs. G. H. P. Evans and R. E. Twidale,
and Baboo Nil Madhub Sen for Res-
pondents.*

Under Hindoo law, the exclusive possession of a plot of a common dwelling-house, which one member of a joint family obtains, very commonly without actual partition, must be referred to the continuing consent of his co-sharers. But as long as this peculiar state of exclusive possession is allowed to remain, it must be taken to involve a concession of all such reasonable rights of user as are necessary for the ordinary purposes of residence, having regard to the circumstances of Hindoo life.

Phear, J.—LEELAH SINGH and three others, plaintiffs in this suit, and Sheo Pershad Singh, the defendant, are shareholders of certain joint property.

It appears that the plaintiff was commencing the building of a house, *nautch-ghur*, in an open space of the courtyard around which the parties to this suit seem to dwell. But he was stopped by an order made by the Fouzdaree Court on a complaint preferred thereto by the defendant. In effect, he

brings this suit for the purpose of getting rid of this order of the Fouzdaree Court, which has the effect of operating as an injunction restraining him from building upon the land which is the subject of suit; and it operates, as we had occasion to point out during the argument, until the plaintiff shall get an authoritative declaration of a Civil Court of his right to carry on the building without obstruction on the part of the defendant. We are thus in the suit called upon to say whether or not the plaintiff has the right upon which he relies to build in the courtyard, or plot of ground which forms the subject of suit. It seems to be admitted that this courtyard forms a portion of the dwelling ground upon which the various members of the family reside. And the Lower Appellate Court has recorded that it is admitted to be joint and undivided property of the plaintiff and the defendant. The plaintiff, however, contends that it is a courtyard, or compound attached to the particular house in which he dwells; that he has had in that sense exclusive possession of it from time immemorial; and therefore is entitled to do with it what he likes. That, at any rate, is pretty much the contention which has been made in argument in this Court, though no doubt the plaintiff only claims the right of building his structure upon the foundation of some previously existing building.

The Lower Appellate Court starting with the admission that this courtyard is a joint undivided property of the plaintiff and his co-sharers, including the defendant, has found as a fact upon the evidence before it that this disputed land has been held from ancient time by the plaintiff. This is somewhat a vague finding. But it is perhaps made a little more precise by what seems to us further on in the judgment to be a finding to the effect that the defendant had not had occupation of it.

It is important, however, to remark at the outset that, whatever these findings of fact of the Lower Appellate Court amount to, the parties themselves have not contended in this suit that there ever was a partition of the land, which is the subject of the suit. The plaintiff does not say that he has got a right to build upon this courtyard, because it has come to be his own exclusive property by reason of anything which must be treated in effect as a family partition: he goes no further than saying that he has been enjoying the space from time immemorial as a courtyard appurtenant to his dwelling-house

which he occupies by right of his being a member of the joint family. This being so, it appears to us that the findings of the Lower Appellate Court do not suffice to support the allegation of right upon which the plaintiff comes into Court. We ought to add that the first Court has found the further fact that there was no structure or foundation previously on the spot upon which the plaintiff is now building. And although the plaintiff in his appeal to the Lower Appellate Court objected that the first Court had not sent out an Ameen for the purpose of procuring all the information which he ought to have procured bearing upon this question, he did not object to the correctness of the first Court's finding in regard to that question on the evidence as it stood. The Lower Appellate Court, in its judgment, makes no allusion whatever to this finding of the first Court, or to the complaint of the appellant which we have mentioned.

And we think it must therefore now be taken, in addition to the facts which we have already detailed, that there was no structure or foundation of a structure previously existing on the spot which has been chosen for the building of this *nautch-ghur*. We repeat, then, that we think the case, as found by the Lower Appellate Court, does not give the plaintiff a right which he seeks to have declared. In our judgment, as we understand joint possession under Hindoo law, that peculiar exclusive possession of a plot of a common dwelling-house, or set of dwelling-houses, which one member of a joint family obtains very commonly without an actual partition having been come to between the members of the family, is a possession which must be referred to the continuing consent of his co-sharers. So long as no actual partition is come to, either as a result of a suit, or formally between the parties themselves, or evidenced by long acknowledgment on the part of the members of the family, the possession is merely that which for convenience sake is conceded by all the members jointly to each one of them; and it may be put an end to, and a completely new arrangement come to at any time by the members of the family if they think fit to make the change.

As long, however, as this peculiar state of exclusive possession is allowed to remain, it seems to us that it must be taken that the acquiescing members of the family concede to the person who has the exclusive possession, all reasonable rights of user of his

separate plot, or separate portion of the dwelling-house, as is necessary for the ordinary purposes of residence, having regard of course to the circumstances of Hindoo life.

We think upon the authority of the cases, some of which have been cited, decided in this Court, we must hold that the concession on the part of the acquiescing members does not go to the extent of enabling the possessor of the dwelling-house to alter the character of the property, or to do anything with it which is not consistent with such user of it as might be ordinarily expected to take place. If he desires to build a new and additional structure upon a portion of the house-ground, it seems to us that he has no right to do so, and in that way materially to alter the condition of the property without obtaining the assent of his co-sharers. If this view be correct, assuming that the plaintiff in the present suit had an exclusive possession of the courtyard as an adjunct to the particular portion of the dwelling-house which he occupied, we think he would not be entitled to use that courtyard otherwise than for the ordinary purposes of and incidental to residence in his house without the assent and knowledge of his co-sharers. He has attempted, confessedly, without the permission of the defendant, one of his co-sharers, to build upon it according to the finding of the Lower Court an entirely new structure, namely, a *nautch-ghur*. It is not pretended that anything of the kind before existed there, or anywhere in the proximity to it as a part of his dwelling-place. It seems to us that, in attempting to do this, he has gone beyond his right. It has not been shown, or attempted to be shown, upon the evidence that it is an usual thing or a step to be expected of an occupier of a dwelling-house of this kind as a member of a joint unseparated family that he should erect a *nautch-ghur* in the middle of his courtyard. And inasmuch as this suit is brought to get an authoritative declaration from the Civil Court to the effect that the plaintiff has a right as against his co-sharer, the defendant, to build this *nautch-ghur* under the circumstances which we have mentioned, we think the plaintiff fails to make out his case. It seems to us that, upon the findings of fact which the Lower Appellate Court has come to, the plaintiff's suit ought to have been dismissed.

For these reasons, we would uphold the appeal and dismiss the plaintiff's suit with costs in all the Courts.

The 9th June 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Decree—Questions arising in Execution—Act XXIII of 1861 s. 11.

Case No. 151 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 8th April 1872.

Oseemunissa Khatoon (Plaintiff)
Appellant,

versus

Ameeroonnissa Khatoon (Defendant)
Respondent.

Baboo Chunder Madhub Ghose for
Appellant.

Baboo Romesh Chunder Mitter for
Respondent.

Where a decree is obtained against a party to a suit in his representative capacity, any question arising as to the right to execute it under Act VIII of 1859 s. 203 against the private property of the judgment-debtor, on the ground that he had received the property of the deceased, or that the property in question was really that of the deceased, would be cognizable, and might properly be determined during the progress of the execution proceedings.

Couch, C.J.—We think the objection taken for the respondent that Section 11 of Act XXIII of 1861 prevents the suit being brought must be allowed.

A suit was brought by Ozeeroonnissa for her dower, and the present plaintiff was made a defendant in it on the allegation that she had had possession of the estate of Abdool Guffoor, the husband of Ozeeroonnissa, which estate was said to be liable for the dower.

She was unquestionably a party to the suit, and the words in Section 11 "any other question arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree" would apply to her, and to the question how

the decree should be executed. And if any question arise as to the right to execute the decree under Section 203 against property which belonged to her, on the ground that she had enjoyed Abdool Guffoor's property and was liable to make good the amount which she had enjoyed, or whether the property was really Abdool Guffoor's, they would both be questions relating to the execution of the decree and between the parties to the suit. The judgment of the Judicial Committee goes quite to that extent. Their Lordships lay down that the private property of a person, who is made a party to the suit in a representative capacity, may, under certain conditions, be attached, but there it must be shown that he has received the property of the deceased of which he has failed to prove a proper disposition. These are things which are cognizable, and may properly be ascertained in the suit in which the decree is made during the progress of the execution proceedings founded upon that decree. And the reason seems to us to be, that the Court having the parties before it in the suit, it is proper that all questions between them relating to the execution of the decree should be determined, and there should not be the expense of separate suits to determine such questions. The most liberal interpretation ought to be given to this provision in order to carry out what was the design of the Legislature. It is true that their Lordships in the Judicial Committee, in the case quoted,* do not give effect to the objection. Looking at all the circumstances, they considered that the objection under Section 11 was a matter of procedure, and might fairly be met by another objection arising out of matters of procedure, and that it was so met in the case before them. Still we have the law which they laid down overruling the decision of the Full Bench of this Court. That was a decision only of the three Judges who sat, but still, according to the rules of this Court, it would, if it had not been overruled, have had to be followed by the High Court.

It seems to us that the objection must prevail, and that the question raised in this suit was one to which Section 11 of Act XXIII of 1861 applied; but as the plaintiff seems to have been led to bring this suit by the decision of the Full Bench, and this appeal was brought before the judgment of the Privy Council had reached this country, we think that the parties should pay their own costs.

* 18 W. R., 685.

The 10th June 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Contribution—Evidence.

Case No. 213 of 1872.

*Regular Appeal from a decision passed by
the Subordinate Judge of Patna, dated
the 20th June 1873.*

Mussamut Khatoun Koonwar (one of the
Defendants) *Appellant,*

versus

Baboo Hurdoot Narain Singh (Plaintiff)
Respondent.

*Mr. R. E. Twidale and Moulvée Syud
Murhumut Hossein for Appellant.*

*Mr. R. T. Allan and Baboo Boodh Sen
Singh for Respondent.*

In a suit by one of several shareholders in certain mortgaged property to recover contribution on account of payment made by plaintiff to save the property from being foreclosed, where he (plaintiff) relied on the sudder jummas assessed on the villages to which his claim related, and the Court considered that the zemindar's collections would be better evidence of the relative values of the villages and the proportion payable by defendants, plaintiff was permitted, in appeal to the High Court, to withdraw his suit with permission to bring a fresh action.

Phear, J.—In this case, the plaintiff, one of several shareholders in certain mortgaged property, paid off the whole mortgaged debt in order to save the property from being foreclosed; and he brings this suit in order to recover from the defendants, who are, he says, the other shareholders in the property, their respective contributions to the debt, *i.e.*, the amount which they ought each to contribute towards the same which he has paid off.

He says in his plaint that the appealing defendant has obtained by auction-purchase from other shareholders three-fourths of four mouzahs which he specifies part of the property mortgaged; and it is on the ground that he being a shareholder in the property to this extent, whatever that may be, that the plaintiff sues him for contribution. The obligation then resting on the defendant to contribute is measured by the relief which the plaintiff has been the means of causing to him by paying off the debt. This being so, it is quite clear that the portion of the

amount paid off which this defendant is liable to contribute must be measured by the proportion of the value of the share which he has got in the property to the value of the whole mortgaged property. To put this statement in a more concise form, the ratio between the three-fourths of these four mouzahs to the whole mortgaged property expresses the fraction of the whole amount of mortgage debt which this defendant is bound to repay to the plaintiff. And we need hardly say, after having made this explanation of the nature of the plaintiff's suit, it was incumbent upon the plaintiff to give some evidence tending to show what was the ratio between the three-fourths of these mouzahs and the whole of the mortgaged property. But it appears to us that he has not given any evidence of this sort. He has given evidence of the sudder jumma which the different mouzahs of the property are assessed in to Government; and he has relied upon that, as affording sufficient evidence of the relative values of the mouzahs, to support his claim. But it appears to us that the jummas in which the different mouzahs were assessed to Government—it may be a very great many years ago—cannot, without more, be taken as evidence of the relative value of these mouzahs now. And assuredly in no case could the amount of these jummas be the *best* evidence bearing upon the point, because we apprehend that the zemindar's collections up to the present time would be greatly better evidence of the actual present relative values of the mouzahs. The plaintiff, must, from the nature of his case, have been able to produce evidence of the zemindar's collections; and no reason whatever has been assigned for his not having done so. As we before observed, for some cause or other he has been content to rely upon the supposed evidence afforded by the jumma of the villages, and as that in our opinion is insufficient to support the finding of fact on this issue, the plaintiff fails in his suit, and therefore we should be justified in dismissing it.

It is clear, however, from the written statement of the defendants themselves and the general facts of the case, which are hardly disputed, that the plaintiff has a good claim for contribution of some amount against the appealing defendant; and we think, under all the circumstances, that instead of passing a final decree against him now on the ground of there being no evidence to support his case, it is right in the interest of justice to allow him to withdraw his suit

with permission to bring a fresh suit to enforce his claim against the defendants.

Although the other defendants have not appealed, the result will be of course that the decree against them goes with the suit. The suit will have to be brought afresh against all.

The plaintiff must pay the appealing defendant's costs in both the Courts.

The 11th June 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Mahomedan Law—Acknowledgment of Sonship.

Case No. 1069 of 1872.

Special Appeal from a decision passed by the Judge of Jessore, dated the 19th April 1872, reversing a decision of the Subordinate Judge of that district, dated the 17th June 1870.

Nubo Kant Roy Chowdhry (Plaintiff)
Appellant,

versus

Mahatab Bibee and another (Defendants)
Respondents.

Baboo Anund Chunder Ghosal for
Appellant.

Baboos Mohinee Mohun Roy and Debendro
Narain Bose for Respondents.

Where in a transaction with a third party, A describes B as his son, and B speaks of A as his father, the acknowledgment of sonship is complete and formal, and, under the Mahomedan law, conclusive against all parties.

Jackson, J.—THE plaintiff in this case appears to have relied upon a title derived

from one Fuzl Russool, who, he alleged was the absolute owner of some portions of the property to which the suit related, and inherited the remaining portion from Abdool, whose son Fuzl Russool claimed to be. It seems that the ownership of Fuzl Russool in his own right as to two of the properties in suit has been conclusively found to be disproved, and the whole property appears to have been that of Abdool. As to the relationship between Abdool and Fuzl Russool, the Judge has come to the conclusion upon the evidence in the case that the paternity is not made out. He has accordingly dismissed the plaintiff's claim.

The contention in special appeal is that the Judge had before him on the record a solemn and formal acknowledgment of Fuzl Hossein by his alleged father Abdool, and that, under the Mahomedan law, such acknowledgment is conclusive against all parties. That there is such an acknowledgment on the record is not denied. The Judge simply deals with the question whether the document in which the acknowledgment is contained is evidence in the case. He seems to have been under the impression that only a copy had been submitted to him, and that the circumstances were not such as to justify the reception of the copy; but it has been shown to us, and it is admitted by the respondent's vakeel, that the original was actually with the papers of the nuthee which was before the Judge. This acknowledgment is amply sufficient for the purpose. In that document, Fuzl Russool and Abdool join in a transaction with a third party, in which Abdool describes Fuzl Russool as his son, and Fuzl Russool speaks of Abdool as his father. Nothing can be a more formal and complete acknowledgment than this, and under these circumstances the right which the special appellant claims follows from the authority of the case reported at page 55 of volume 4 of the Bengal Law Reports, Appellate Civil Jurisdiction.* This being so, the necessity which the Judge considers dispensed with arises of deciding on the genuineness of the will of Abdool, the father of Fuzl Russool; and although the special appellant's claim to hold two of the properties in right of Fuzl Russool himself fails, yet he would be entitled to the share which the said Fuzl Russool inherited as heir of his father Abdool. The case must go back to the Lower Appellate Court in order that these questions may be disposed of.

* 12 W. R., 498.

The 12th June 1873.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Execution-sale—Possessory Suit—Limitation.

Case No. 1125 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Dinagepore, dated the 19th April 1872, reversing a decision of the Moonsiff of that district, dated the 28th December 1871.

Gedroo Sircar (Plaintiff) *Appellant,*

versus

Beharee Lall Roodro (one of the Defendants)
Respondent.

Baboo Issur Chunder Chuckerbutty for
Appellant.

No one for Respondent.

A suit to recover possession of certain shares of a tenure alleged to be the ancestral tenure of plaintiff and defendant J, on the ground that the whole property had been taken possession of by defendant B under cover of his purchase of J's under-tenure at a sale in execution, was held not to be barred by limitation, even though brought after one year from the date of the purchaser's obtaining possession.

Kemp, J.—THIS was a suit instituted to recover possession of an 8-anna and 4-anna share of a certain tenure alleged to be the ancestral tenure of the plaintiff and defendant Jogessur. Jogessur's under-tenure was sold in execution of a decree, and purchased by Beharee Lall. It is alleged in the plaint that the purchaser, under cover of the purchase, took possession of the whole of the property in 1276. This suit was therefore instituted to recover possession of the plaintiff's share, or 8 annas and 4 annas of the tenure in question. The purchaser's defence was that the plaintiff not having sued within one year from the date of the purchaser's obtaining possession the suit was barred, and on the merits that the whole property in dispute belonged to Jogessur and not to the plaintiff.

The first Court set aside the plea in bar, and held that the suit was in time as having been brought within twelve years after the date of the cause of action. On the merits,

the first Court found that the plaintiff was entitled to the shares he claimed, and therefore decreed the suit.

On appeal, the Judge appears from his decision to have agreed with the Moonsiff on the merits, as he says that he regrets much that the law on the issue in bar renders it incumbent on him to reverse the decision of the Moonsiff, and more so, he observes, as it entails a very considerable hardship on the plaintiff, respondent.

On the law point, we are of opinion that the Judge's decision is wrong. The decision relied on by the Judge, which is to be found in the 4th Weekly Reporter, page 42, has been reversed by a Full Bench ruling dated the 12th March 1867, reported in Volume VII, Weekly Reporter, page 256. We therefore reverse the decision of the Judge, restore that of the first Court, and decree the plaintiff's suit with costs in the Lower Courts. The plaintiff will pay his costs in this Court.

The 12th June 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Act VIII of 1859 ss. 127 & 170—Penalty for Default.

Case No. 1732 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 22nd July 1872, affirming a decision of the Moonsiff of Arrah, dated the 8th December 1871.

Raj Chookun Duswandi (Plaintiff) *Appellant,*

versus

Busjeet Tewaree and others (Defendants)
Respondents.

Mr. R. T. Allan and Baboo Bama Churn
Banerjee for Appellant.

Mr. R. E. Twidale for Respondents.

A Court is not justified, under either s. 127 or s. 170 of Act VIII of 1859, in imposing penal consequences upon a party who fails to appear, by passing a verdict against him, unless it is clearly made manifest,

first, that he had been ordered or directed to attend and wilfully refused to obey the order or direction; and secondly, that the evidence which he was required to give was really material to the matter in suit.

Quere.—Whether the party must be proved by other evidence to have personally received notice of the order before the penal provisions are applied?

Phear, J.—THE fortune of this case has been somewhat varied. It appears that it was twice determined by the first Court, and twice remanded by the Appellate Court for retrial. On the occasion of the second remand, the first Court felt it necessary to require the attendance of the plaintiff for the purpose of his affording information or evidence to the Court: and apparently an order of some kind was made for his attendance. The case was postponed in order that he might attend. He did not appear on the day appointed; and the case was again postponed. The same thing happened a third time. And finally as the plaintiff did not appear, and the reason for his non-appearance as given by his pleaders was not satisfactory, the Court dismissed his suit.

There may be some question perhaps whether this was done in the exercise of the powers expressly given to the Courts by Section 170 of Act VIII of 1859, or of those which result from the provisions of Section 127 of the same Code. But it is not very material to determine which of these two Sections was applicable to the particular case, inasmuch as the course prescribed to the Court by each of them seems to be in substance the same.

The plaintiff appealed against this decision of the first Court, and the Lower Appellate Court dismissed his appeal.

The matter now comes before us on special appeal.

I need hardly say that both Sections 170 and Section 127 are highly penal in their effect. The Legislature has thought fit in these two Sections to empower the Court, upon the occurrence of certain contumacy on the part of a party to the suit, to give a verdict against him irrespective of the merits of the case. No doubt it may be said that the very fact of the party being guilty of contumacious conduct under the circumstances is evidence against the goodness of his cause. But it is not merely upon that ground that the Legislature provides the Court with the power of deciding against him, for it gives the Civil Court power of doing this without the slightest reference to the merits which may be apparent on the evidence previously taken between the parties. In short, as I have already said before, the

Sections are highly penal in their results, and they have always been so considered by this Court. This being so, it is incumbent upon the Civil Court which professes to act upon either of these Sections, to take care that the contingencies contemplated by them have in effect occurred.

Section 170 runs in these words:—“If any person, being a party to the suit, who shall be ordered to give evidence or produce a document, shall, without lawful excuse, fail to comply with such order, . . . the Court may either pass judgment against the party so failing, . . . or make such other order in relation to the suit as the Court may deem proper in the circumstances of the case.”

And in the Section 127 the words are:—“If the party so directed to attend shall, without lawful excuse, fail to appear in person on the day to be so appointed, the Court may pass judgment against him, or make such other order in relation to the suit as it may deem proper in the circumstances of the case.”

It appears to me plain that the Court is not justified under either of these Sections in imposing penal consequences upon the party by passing a verdict against him, unless it is clearly made manifest, first, that he had been ordered or directed to attend and wilfully refused to obey the order or direction; and, secondly, that the evidence which he was required to give was really material to the matter in suit between the parties.

In the present instance, it seems to me that neither of these points is made clear by the judgments of the Courts below, or by any of the evidence on the record which has been brought to our notice. I am by no means satisfied that the evidence or information which the first Court desired to get from the plaintiff was material to the merits of the case between the parties. Neither Court in its judgment expressly says what was the purpose for which the Moonsiff desired to interrogate the plaintiff. The Moonsiff himself says that he desired to put a question which was on the record, and upon referring to that which is stated to be the question so referred to, I cannot, as I have already said, satisfy myself that it was in any substantial degree material to the issue which had to be tried between the parties. And further than this, I cannot gather from the judgments of either of the Lower Courts or from the evidence that the plaintiff was personally made aware of any order having been passed by the Court for his attendance. I suppose that the order was

made in open Court upon his pleadings, and it does not appear in any way that that order, if so made, was in fact communicated to the plaintiff. According to the judgment of the Moonsiff, those pleadings stated that they did not know where the plaintiff was, and that no one connected with him had this knowledge, because he had gone on a pilgrimage some time before and had left no directions as to where he was to be found at any time. This may or may not be a true statement of fact. But it does not alone, to my mind, in any way serve to establish in any degree that the order made by the Court for his attendance ever came to the personal notice of the plaintiff.

There is much in the matter which was discussed by the Moonsiff relative to the alleged mookhtearnamah which might serve to throw suspicion upon the honesty of the people who were acting for the plaintiff. But even this I think, in a matter of this kind, ought not to be considered as evidence of contumacy on the part of the plaintiff himself. I do not desire to go so far as to say that an order for the attendance of any party to the suit could be considered as an order which need not be obeyed, or treated otherwise than as a valid order of the Court, merely because it was verbal, and was not put into the form of a written process, and so served upon the pleaders. All that I say upon the materials before me is that I am not satisfied that the order which the Court passed for the attendance of the plaintiff, in whatever form it was conveyed to the pleaders, ever reached the plaintiff, and that he wilfully disobeyed it. For these reasons it seems to me that upon this record the discretion which the Civil Court possesses, either under Section 127 or Section 170, was not rightly exercised in the present case; and I think that the decision of the Lower Appellate Court ought to be reversed, and the case remanded to that Court for retrial on the merits upon the evidence which is on the record.

Costs will abide the event.

Ainslie, J.—I concur in the order made in this case remanding it to the Lower Appellate Court for trial. And I think that this order may be supported under either Section 127 or Section 170. If the Courts are to proceed to enforce the penalties prescribed by either of these two Sections, they are bound to state clearly the reasons which may make it necessary to call upon a party to the suit to appear in person, so that the Courts above may be enabled to judge whether

those reasons disclose sufficient ground for the exercise of the discretionary power of punishment entrusted to them by the law. But whether a party upon whom an order to appear in person has been made at a hearing of the suit in open Court must be proved by other evidence to have personally received notice of the order before the penal provisions of Sections 127 and 170 are applied, is a matter on which I entertain some doubt. I am inclined to think that, under Section 18, a direction to the pleader made in open Court under Section 127 would be sufficient to throw upon the party represented by such pleader the burden of proving that, either through the neglect of his pleader or other circumstances, the notice in fact did not reach him; and that, in the absence of such proof, the Court ought to presume that the party had notice of the order. However, it is quite unnecessary to discuss this point further, because on the other ground I think the order of the Court below cannot be sustained.

The 12th June 1873.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Limitation—Closure of Court.

Case No. 1121 of 1872.

Special Appeal from a decision passed by the Judge of Julpigooree, dated the 12th April 1872, affirming a decision of the Subordinate Judge of that district, dated the 22nd February 1872.

Kudomessuree Dasse and another
(Plaintiffs) *Appellants,*

versus

Enam Ali Mooktear (Defendant)
Respondent.

Baboo Issur Chunder Chuckerbutty for
Appellants.

Baboos Kishen Doyal Roy and Grija
Sunkur Mojoondar for Respondent.

A plaintiff is not entitled to make any deduction from the period of limitation because the Court is closed.

Kemp, J.—This is a suit to recover possession under a purchase in 1254 from

Joykristo Doss and Rajkristo Doss. The plaintiff states that, in 1277, the lands in dispute were sold in execution as against plaintiffs' vendors, and were purchased by the defendants in this suit. The plaintiffs, or one of the plaintiffs, petitioned under Section 269 of Act VIII of 1859, and the Court rejected the application and directed the plaintiff to bring a regular suit. That order is dated the 9th April 1870, and this suit has not been brought within one year from that date.

The Lower Courts dismissed the plaintiffs' suit as barred.

The first argument taken in special appeal is "that the Lower Courts are wrong in holding that your *petitioners* (not one plaintiff but both) were bound under Section 269 of the Civil Procedure Code to sue within one year from the date your *petitioners'* petition was rejected, although there was no enquiry made with reference to your *petitioners'* petition as is directed by that Section, and consequently no proper order for the setting aside of which your petitioners were bound to sue within one year under the Section in question was passed."

Turning to the proceedings taken under Section 269, we find that the plaintiff objected to the sale in execution on the ground that she had already purchased the property from the judgment-debtors Joy Kishen and Raj Kishen, and in support of that allegation she put in a deed of conveyance, and distinctly asked the Court with reference to that deed to pass an order setting aside the sale and to confirm the possession of the petitioner under the Section. Section 269 enacts that the Court shall enquire into the matter of the complaint, and pass such order as may be proper in the circumstances of the case. The Court did enquire into the matter, and did pass such order as was proper in the circumstances of this case, the order being that the plaintiff's name is not entered in the zemindar's serishtah, and that the deed of conveyance is not registered; therefore the plaintiff's petition is rejected. There was an enquiry and an order as contemplated in the Section. Therefore it was for the plaintiff to sue within one year from the date of that order. Clearly she is not entitled to deduct any time simply because the Court was closed. She ought to have brought her suit within the proper time (*vide* III Weekly Reporter, pages 5 and 6, Small Cause Court Rulings).

The appeal is dismissed with costs.

The 12th June 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Joint Possession—Sharer's Rights—Trespass by Co-sharer—Perpetual Injunction.

Case No. 1688 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 31st July 1872, reversing a decision of the Mōonsiff of Chumparun, dated the 31st July 1871.

Mr. John Stalkartt (Defendant) *Appellant,*
versus

Gopal Panday and others (Plaintiffs)
Respondents.

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory for Respondents.

In a suit by a 4-anna shareholder for an injunction to restrain the 12-anna shareholder from carrying on without plaintiff's permission the cultivation of indigo in the joint estate of which defendant claimed exclusive possession—

Held that as the land had not been partitioned, plaintiff was part owner of every beegah of the mouzah and could claim either to occupy the land jointly with the defendant, or to insist that the land should not be occupied and used by any person (excepting those with a right of occupancy) otherwise than with his assent: and that the possession which defendant had taken amounted to a trespass.

Held that plaintiff was entitled to a perpetual injunction directed particularly to defendant's trespass, and that defendant ought to be restrained from excluding plaintiff from joint possession and from taking, retaining, or giving exclusive possession of the land.

Phear, J.—THE facts of this case seem to be hardly disputed. The plaintiff may be described as the 4-anna shareholder, and the defendant as the 12-anna shareholder in a certain mouzah.

In the four years which preceded 1277, the defendant also held a ticca lease of the plaintiff's 4 annas, and so had the whole 16 annas in himself. During this time he took into his sole occupation certain lands which it is said were abandoned by the ryots, and he planted them with indigo.

In 1277, the ticca lease of the 4 annas came to an end, and the 4-anna share therefore reverted to the plaintiff. The first act of the plaintiff was to object to the possession and occupation of the ryotee land by the defendant and to his cultivating it with indigo. Nevertheless the defendant took steps for carrying on the cultivation, and thereupon the plaintiff brought this suit

seeking therein to have it declared that he was 4-anna shareholder over the whole mouzah, and further asking for an injunction against the defendant to restrain him from cultivating indigo in the lands in question.

The defendant does not dispute the plaintiff's facts, or deny that he was about to continue the cultivation of the indigo notwithstanding the dissent of the plaintiff. But his case is that as malik of 12 annas he is entitled to do this; and he also, I believe, in the first Court said by the mouth of his pleader that he is ready to pay such ryotee rent to the plaintiff as may be fair and reasonable.

The Lower Appellate Court declared the plaintiff's right as claimed, and issued the injunction.

It appears to me plain upon these facts that the defendant has disturbed that enjoyment of the plaintiff in the lands in question to which he was entitled as a 4-anna shareholder. The lands have not been partitioned, and as holder of an undivided 4-anna share he is part owner of every beegah of the whole mouzah, and by virtue of that right of ownership I apprehend that he can claim either to occupy the land himself jointly with the defendant or the defendant's assignees, or to insist that the land shall not be occupied and used by any person (excepting always persons having a right of occupancy) otherwise than with his assent. The defendant, however, has personally taken exclusive occupation of a certain portion of the soil, and maintains that he has a right to enjoy that exclusive occupation whether the plaintiff accords him his permission or not. This appears to me to be a complete disclaimer of the plaintiff's right as 4-anna shareholder, and to the extent to which the defendant has acted up to his assertion he has ousted the 4-anna shareholder from his rights in the land. In a case in England, wherein three persons tenants in common of certain lands to the extent of five-sixths of it, leased the land to a Railway Company who made a railway upon it, this was held to be such an exclusion of the remaining tenant in common (one-sixth shareholder) from the land, such an obstruction to his right of entrance upon the land, as to amount to ejectment (see *Durham and Sunderland Railway vs. Watson*, 3 Beav., 119, and 5 M. & W., 564). So here the one shareholder, the defendant, has taken exclusive possession of the soil, not as in the case cited through a tenant, but by his own hand. He does not say that events have occurred

which, for any reason, render it obligatory upon or the duty of the plaintiff to assent to his, the defendant's, possession and cultivation of the land. He maintains that he has a right to do what he has done, altogether regardless of the plaintiff's will in the matter. He is not receiving from occupiers of the land rents to a share of which the plaintiff is entitled; he is not himself occupying the land as tenant under the plaintiff and himself as joint landlords; he is not cultivating and managing the land for the common profit of the plaintiff and himself, though he may be willing to pay a reasonable rent; he is occupying for himself alone and keeping the plaintiff off the land. If this be so, the possession which he has taken seems to me unquestionably such an invasion of the plaintiff's proprietary right as amounts at least to a trespass, and that the plaintiff has good cause to come into Court to complain of that trespass and to have his rights vindicated and declared. He does not ask for damages; but he asks for an injunction in order that the defendant may be prevented from repeating his acts of trespass and from continuing his invasion of the plaintiff's rights in the property. It seems to me that the plaintiff has established his rights to the declaration as against the defendant of his being 4-anna shareholder in the land which is the subject of suit jointly with the defendant, and of his being entitled as such shareholder to joint possession of the land together with the defendant. And he has further, I think, made out a good claim to such remedy as the Civil Court, considered as a Court of Equity, can give him against repetition of the trespass complained of.

In ordinary cases of trespass, no doubt, where the trespasser is a mere stranger, a judgment which authoritatively declares the plaintiff's right and awards him damages affords sufficient relief. But in the present case, the defendant himself is entitled to possession as well as the plaintiff, and his wrongful act has been committed under claim of right. Under circumstances such as these, it appears to me that a Court of Equity is justified in protecting the plaintiff's interest by a perpetual injunction if it sees fit on all the facts to do so; and I think that there are many English authorities to this effect (see *Loundes vs. Bette*, 10 Jurist, N. S., 226). The Court, no doubt, will not generally interfere by injunction to control a tenant in common's dealings with joint property which is rightly in his possession, unless

those dealings threaten to be of a destructive character: but it will compel him to allow his co-tenant a proper share in the enjoyment of the property. In this view, the injunction in the form which the Lower Appellate Court has given to it is probably not altogether satisfactory. It should be expressed in such a way as to be limited to the prevention of the particular trespass of which the defendant has been proved guilty. That trespass has been in fact an ouster of the plaintiff from the enjoyment of the property by the act of taking exclusive possession of a certain land against his consent. I think, therefore, the injunction ought to be directed particularly to this conduct, and the defendant ought to be restrained from excluding the plaintiff from possession of the land as joint sharer, and also restrained from taking exclusive possession of the land, or retaining exclusive possession of the land, or from giving exclusive possession of it to any person by lease or otherwise without the consent of the plaintiff. In fact the appeal is dismissed, and the appellant must pay the respondent his costs.

Ainslie, J.—I concur.

The 13th June 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Mortgage of Joint Family Property—Son's
Right to Partition.*

Case No. 1647 of 1872.

*Special Appeal from a decision passed by
the Subordinate Judge of Gya, dated the
29th June 1872, reversing a decision of
the Sudder Moonsiff of that district,
dated the 21st November 1871.*

Lochun Singh and others (Plaintiffs)
Appellants,

versus

Nemdharee Singh and another (Defendants)
Respondents.

*Mr. C. Gregory and Baboo Luckhee Churn
Bose for Appellants.*

*Baboos Unnoda Pershad Banerjee and
Mohesh Chunder Chowdhry for Respondents.*

Case.—In a suit by four sons, members of a joint family,
for determination of right and partition of family

property which had been mortgaged by their father as security for a loan and had been sold in execution of a decree, the father being still alive, as well as his second wife who was not incapacitated by age from bearing children :

HELD that the mortgagee could not stand in a better position than the father, against whom the sons had a right to require partition of the property so far as it was ancestral.

Phear, J.—It seems to be pretty clear upon the facts which are now before the Court, that the defendant, respondent, cannot stand in a better position than the father who made the mortgage to him. As against the father, it is unquestionable that the sons have a right to require partition of the ancestral property. So far, therefore, as any property which was the subject of suit was ancestral, the decree of the Lower Appellate Court dismissing the plaintiff's suit was wrong. The plaintiffs are entitled to have a partition declared.

But it appears to us that one moiety of the property, which was mortgaged by the father, and which is the subject of this partition suit, came to the father from his deceased brother. And on the authority of the case which is reported in X Bengal Law Reports, page 183,* an authority which we are not in any way disposed to question, the moiety of the property which came from the brother was not property which the sons had a right to require partition of. So that, as far as regards that moiety, we think that the plaintiff's suit was rightly dismissed. The result is that the appeal must be to some extent upheld, and the decree of the Lower Court so far as it affected one moiety of the property which was ancestral should be reversed, and it must be declared that the plaintiffs are entitled to have a partition of the said moiety in the proportion of four-fifths to the plaintiffs, and one-fifth to the father, who is represented in this suit by the defendant, respondent.

We think that each party ought to bear his own costs in all the Courts.

* 18 W. R., 477.

The 13th June 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Rent Suit—Butwarrah—Jummabundee Papers—
Evidence.*

Cases Nos. 1694 to 1696 of 1872.

*Special Appeals from a decision passed by
the Additional Judge of Tirhoot, dated
the 14th June 1872, reversing a decision
of the Moonsiff of Madhoobaree, dated
the 8th December 1871.*

Kishore Doss and others (Defendants)
Appellants,

versus

Pursun Mahloon and others (Plaintiffs)
Respondents.

Baboo Boodh Sen Singh for Appellants.

*Baboos Chunder Madhub Ghose and
Doorga Dass Dutt for Respondents.*

Jummabundee papers filed by a malik in butwarrah proceedings to which the tenant is not necessarily a party, cannot be used as evidence against such tenant in a suit for arrears of rent.

Phear, J.—THESE three suits are suits brought by the malik to recover arrears of rent from the tenant. The Lower Appellate Court has given the plaintiff a decree in all the three suits for an amount per beegah less than that which the plaintiff claimed. But it seems to us that, with regard to the first two cases, namely, those which are the subject of special appeals 1694 and 1695, there clearly ought to have been no decree in favor of the plaintiff, because it appears upon the record when an account is taken of the amount which the defendant has paid to the plaintiff, that sum overtops the amount to which the plaintiff is declared entitled by the decree of the Court. Consequently there is, on the face of the record, nothing due from the defendant to the plaintiff. Under these circumstances, it is clear that the suit which is, as we have already said, a suit for arrears of rent, that is, rent unpaid, ought to be dismissed.

With regard to the third case, the facts are somewhat different. There appears to be a balance due to the plaintiff from the defendant upon calculations of the arrears

at the rate of rent which the Court has declared that the plaintiff is entitled to receive from the defendant. But it has been objected before us on special appeal that the plaintiff did not establish the rates, which the Court has found, by sufficient legal evidence, or indeed by any evidence at all. And it appears to us on the whole that this objection is sound. The Lower Appellate Court has relied upon the plaintiff's jummabundee papers for the years in respect of which the arrears sued for are alleged to be due, corroborated as the Court thinks by other jummabundee papers which the malik filed in certain butwarrah proceedings so far back as 1861-62. Now the jummabundee papers for the years in respect of which the arrears of rent are sought, are clearly by themselves no evidence of the amount which is due from the tenant as rent to the malik. And the former butwarrah proceedings do not mend the matter, for it has always been held that the jummabundees filed by a malik in butwarrah proceedings to which the tenant is not necessarily a party, which papers he has neither interest nor opportunity to dispute, cannot be used as evidence against him. Thus it seems to us that the decision so far as it rests upon the evidence afforded by the two sets of jummabundee papers is without sufficient support.

On the other side, it has been urged that the defendant's own witnesses made out that rent was payable in respect of these lands at the rate which the Court has decreed. However, upon looking into the evidence, and even on the abstract of it which the Judge himself gives, it appears that the defendant's witnesses did not say that the rent was payable by the defendant to the plaintiff at these rates in respect of the lands which are the subject of suit. They merely spoke of a general rate in the village for lands of the same character. In fact, the same witnesses distinctly depose to a less rent being payable by the defendant. They attribute this, no doubt, to the effect of a mokururee right set up by the defendant. But it is immaterial at present for us to consider whether that mokururee right was established or not. The evidence of the witnesses as to the fact of the rent due, for whatever cause they suppose the limitation of rate to have occurred, certainly did not extend to the amount at which the Court has held the rent to be payable by the defendant.

So that on the whole it seems to us, as we have already remarked, that the objection

made on special appeal to the want of evidence sufficient to support the finding of the Court is a good objection, and ought to prevail.

We may add that this objection, so far as the facts have been brought before us, would have been good, and must have been sustained in the other two cases which were the subjects of special appeals 1694 and 1695, if it had been necessary for us to place our decision upon that ground.

The result is that all the three appeals should be upheld, and the decrees of the Lower Appellate Court reversed with costs in both the Courts.

The plaintiff, respondent, raised a preliminary objection to the hearing of the appeal under the provisions of Section 102 Act VIII of 1869, B.C. But we were of opinion that the decision of the Lower Appellate Court did so deal with the case as to involve the determination of a question of some right and interest in the land, and thereby to give us jurisdiction to hear the appeal notwithstanding the value of the suit is below 100 rupees.

The 14th June 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Arbitration or Compromise—Inadmissible Presumptions.

Case No. 1922 of 1872.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 9th September 1872, reversing a decision of the Moonsiff of Arrah, dated the 26th June 1872.

Mohabeer Singh and others (Defendants)
Appellants,

versus

Dhujjoo Singh (Plaintiff) *Respondent.*

Moonshee Abdool Baree for Appellants.

Baboo Taruck Nath Dutt for Respondent.

Nothing which passes between the parties to a suit in any attempt at arbitration or compromise should be

allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court.

No presumption can be raised against a party to a suit from his refusal to withdraw from the determination and submit to arbitration.

Phear, J.—In this case, the Lower Appellate Court has reversed the decision of the first Court; and although the question before it was purely a question of fact, it has not given, as we understand its judgment, reasons for coming to a different conclusion with regard to the facts from that at which the first Court had arrived. The Judge says that the evidence consisted of parol testimony only, and that he saw no reason for discrediting the evidence of the plaintiff's witnesses. But he does not say what are the facts which those witnesses establish, nor does he in any other way give the reason why he is of opinion that the conclusions of the Moonsiff are ill-founded. He adds no doubt that "on examining the evidence of the defendant's witnesses, I observe there is *confliction*." What exactly the learned Judge means by this phrase, we are not certain. It is sufficient, however, for us now to remark that the Moonsiff merely expressed the opinion that the plaintiff had failed to make out his case. If that were so, of course it would be quite immaterial to consider whether there was conflict of testimony to be found in the evidence of the defendant's witnesses.

There are, moreover, two other points in which it seems to us the Judge has allowed his mind to be unduly biased with reference to the decision in this suit. The one arises out of the matter of an amendment of the defendant's written statement. He says:—"That the amending of the defendant's reply to the plaint was not made until after the oral evidence had been recorded: it was then naturally necessary to amend the reply to plaint, as the defendant's oral evidence was directly opposed to that reply, which admitted plaintiff kept his cattle on the spot since twenty years past in a house that fell down finally five or six years ago." And he thinks that the amending of the written statement at this stage of the trial proved dishonesty on the part of the defendant.

The written statement, as it stood originally when it was filed, has been read out to us; and according to our judgment there is not in the whole of that written statement taken together an admission that the plaintiff

kept his cattle for twenty years past on the spot, for the statement set out by saying that he *never kept the cattle there at any time*. The passage which taken by itself does seem to say that the plaintiff kept his cattle there in a house which had been built by the defendant, follows after the first passage, and may well enough be the result of a blunder of the scribe in writing the word plaintiff instead of the word defendant. Whether this be so or not, the written statement as a whole does not, even before it was altered, amount to an admission in favor of the plaintiff.

The second point is in the matter of the arbitration; and there we think the Judge has fallen into an unfortunate error. It appears to us that he ought to have carefully kept this matter of the proposed arbitration from his mind for two weighty reasons. In the first place, because it is, we believe, a rule which all Courts of Justice find it right to observe that nothing which passes between the parties to a suit in any attempt at arbitration or compromise should be allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court. Unless this were so, the only thing which could be prudently recommended to suitors would be, never to listen for one moment to any proposal to settle the matter, or to compromise it, after it had come into the Civil Court. And we feel certain that the Judge of the Lower Appellate Court would not desire to insist upon the desirability of such a doctrine as this.

The second reason is, because there is in truth no cause for inference, either adverse or the contrary, to a party who refuses to submit his case to arbitration, it surely is in no degree discourteous towards the Judge who has to try a case that a party to it should prefer his suit being tried by that Judge rather than settled by private arbitration. The Court can have no sort of reason for thinking badly of a party to a suit who refuses, for whatever reason, to submit his cause to the decision of private arbitrators instead of to the decision of the recognized public tribunal. And besides this, it may well be, indeed as far as our experience goes it is generally the case, that the party who refuses to submit to arbitration has very good cause to think that, however honest the proposed arbitrators may be, he may not be certain to meet with the same broad justice

at their hands as he would at the hands of the public Court. We need not point out how the very fact of the offer to submit to arbitration coming first from the one side may of itself in a very limited community have a disadvantageous effect upon the cause of the other party; because we think that the Judge's own reasoning on the matter affords sufficient illustration of this position.

Again, the suitor before the Court may not have knowledge of persons qualified to act as arbitrators, in whom he personally has such confidence as would induce him to submit his cause to them.

In short, there may be a hundred reasons why a man may honestly refuse to withdraw his case from the determination of a properly constituted Court in order to submit it to private arbitration. And we know of nothing which ought to be used as argument to his prejudice simply because he does refuse to do so.

For these two reasons, we think the Judge has made a serious mistake in raising the presumptions against the defendant which he has raised; first, from the amendment of the defendant's written statement; and, secondly, from his refusal to submit to arbitration. And although the Judge unquestionably does say that his judgment on the merits between the parties was formed before the defendant refused to accept the proposal to submit to arbitration, yet we cannot help perceiving that the mode in which he has expressed himself upon it indicates that, though he did not himself suspect the fact, his mind was not free from bias upon that account when he gave his decision between the parties.

On the whole, it appears to us that the judgment of the Lower Appellate Court reversing the decision of the first Court does not come before us in a satisfactory form. We think the case ought to go back to the Lower Appellate Court to be retried upon its merits.

Costs will abide the event.

The 14th June 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Hindoo Law—Joint Family Property—Alienation
by Father—Rights of Alienee.*

Case No. 1266 of 1872.

*Special Appeal from a decision passed by
the Judge of Gya, dated the 28th March
1872, modifying a decision of the Sub-
ordinate Judge of that district, dated the
21st August 1871.*

Jugdeep Narain Singh (Plaintiff)
Appellant,

versus

Deen Dyal Lall and another (Defendants)
Respondents.

*Messrs. R. E. Twidale and C. Gregory for
Appellant.*

*Baboos Chunder Madhub Ghose, Romesh
Chunder Mitter, and Nil Madhub Sen for
Respondents.*

T borrowed money on the security of certain family property which he professed to pledge in a bond. The loan not being repaid, the lender sued upon the bond, and obtained a decree for the amount of money secured thereby; but not for the sale of the property. In execution, the judgment-creditor attached certain other family property and put up for sale T's right, title, and interest in it, and bought the same himself. Under color of this purchase, he took exclusive possession of the whole of the property. T's only son then sued the lender to recover the property on the ground that he and his father having been members of a joint family under the Mitakshara law, the purchaser of the father's rights and interests could obtain nothing:

Held that the plaintiff was entitled to the decree sought.

Ob. dic.—If the judgment-creditor had got a decree for the sale of the property pledged by the father's bond, and executing such decree had sold and bought the property, he would have been entitled to insist on a partition of the property between the father and the son before it was delivered back.

Further, if the judgment-creditor, even under the money-decree, could show in a regular suit that there was no property belonging to the father which he could find or reach other than that in which the father was jointly interested with his sons as a Mitakshara family, he would have a right to insist on such a partition as would enable him to satisfy his decree in execution.

Phear, J.—In this case, it appears that one Toofanee Singh, a party defendant, executed a bond in June 1863, by which he professed to pledge to the first defendant certain family property to secure the repayment of certain money advanced. The money was not repaid; and in the following year the first defendant

brought a suit against Toofanee Singh upon the bond, and obtained a decree for the amount of the money secured thereby; but he did not obtain a decree for the sale of the property which was covered by the bond. It does not appear that anything was done in execution of this decree until the year 1870, when the first defendant, judgment-creditor, attached certain other family property not covered by the bond, and put up for sale the right, title, and interest of Toofanee Singh in it, and bought that right, title, and interest himself.

Under color of this purchase, the first defendant took exclusive possession of the whole of the property in which Toofanee's right, title, and interest, the subject of sale, existed, if at all, as a joint undivided right. The present plaintiff is the only son of Toofanee Singh, and he brings this suit against the first defendant seeking to recover the whole of the property on the ground that he and his father having been the members of a joint family under the Mitakshara law, the first defendant could obtain nothing by the purchase of the rights and interests of the father in 1870. In many respects the facts of this suit run parallel to the facts of a suit,* which we lately had before us and determined. No doubt, the execution sale was had under the conduct of the judgment-creditor. But the proceedings seem to be regular, and the sale must effectually be treated as a sale by the father of his right, title, and interest. The judgment-creditor himself cannot, we think, claim to have his sale treated as anything more extensive than this. He had the conduct of the sale, and he seized the property and sold it in his own discretion for the purpose of causing the money-decree to be satisfied. The property was not sold in pursuance of a decree directing that it should be sold, or in any manner pointing out that it was the property out of which the debt should be realized. And in this respect the present case seems to us to differ entirely from the two leading cases which have been referred to; the one reported in Marshall's Reports, page 614, and the other in X Bengal Law Reports, Privy Council Decisions, page 294.† The judgment-creditor chose, for reasons of his own, simply to sell the right, title, and interest of the father; and he cannot now, we think, be heard to assert that he is entitled to hold the whole property as if he had in fact sold

* Regular Appeal, No. 209 of 1872, decided on the 17th May 1873.—See *post*, page 192.

† 17 W. R., P. C., 459.

the whole family property, and was at the time of the execution sale entitled so to do. The case then stands thus as the result of that execution sale: the right, title, and interest of the father, the head of a joint family,—the members of which were living together under the Mitakshara law,—the father's right title; and interest in the family property which is the subject of suit, has been in words sold to the first defendant.

But it is further clear on the facts of this case that, at the time of the execution sale, the father had no separate rights and interests in the property apart from his son. There has been no division of interests, partially or completely. The property was, as we understand, enjoyed jointly by the father and the son as a joint Hindoo family under the Mitakshara law; and in this situation no individual has a distinct legal right to any portion or share of the property, such as he can pass to any third person.

At first we were of opinion that these facts would bear the application of the principle which we applied to the case, Regular Appeal No. 209 of 1872. If the father had, in fact, by the sale professed to pass his rights and interests in the property to the judgment-creditor, and so held out that he had power to pass something, and if the judgment-creditor had paid money value for these rights and interests upon the faith of this profession, then, probably, we ought in this suit, as we did in that suit, to take care that a partition of the property should be come to between the father and son, at least to the extent of an assignment of an undivided share to each respectively before the property should be delivered back; because, although, no doubt, under these facts, the purchaser obtained no legal right to the estate, or to any portion of it, so that consequently any member of the joint family has a right to bring a suit for the purpose of recovering it back from him, yet it would obviously be inequitable that the father should, in this oblique way, be able to return to the full enjoyment and benefit of the family estate (as he undoubtedly would if any co-member of the family recovered it from the purchaser) without making good to the purchaser the consideration money which he had paid for it. And that would have been in substance the present case if the judgment-creditor had got a decree for the sale of the property pledged by the father's bond and had pursued that decree by proceedings for sale, and had eventually bought the property under it. The sale, in that course of events, would have

been a sale which the father had brought about by pledging the property sold, for the consideration of the money advanced to him. It would have been manifestly inequitable, supposing those had been the facts of this case, that the father, notwithstanding his acts, should recover back the property entirely free and unencumbered, released even from the burden which he had affected to put upon it.

But these are not the facts of the present case. The judgment-creditor here only obtained a money-decree on the bond against the father, and was only entitled, by reason of his having got that decree, to seek satisfaction of it against the property of the father. He has seized and sold property, which is not the property of the father, and in which the father does not possess any assignable interest. The sale which has taken place as a consequence of this course of action, although it is a sale no doubt by the father of his rights and interests, so far as he had any rights and interests at the time, still does not amount to any voluntary representation made by the father of his having any rights and interests in the property; still less, if we may say so, was it ever a representation of fact made by the father for the purpose of inducing the defendant to advance money to him. The money had been advanced long before. It seems to us, therefore, that there is nothing in the conduct of the father in relation to the sale of this property to the defendant, which gives rise to any equity between him and the defendant such as entitles the latter to call upon the father to divide the property with his sons, and so to make the property available for being appropriated and retained by the creditor, to the extent of the father's potential rights. It seems to us, therefore, on the whole, that the ground upon which we decided the former case, and were there led to impose a condition upon the recovery of the joint family property by the plaintiff, does not here exist. But there might have been another ground upon which the defendant could insist as against the father and the sons that this joint property should be divided; and perhaps it is as well to refer to it here in order to show that it is not involved in the facts before us. Under the money-decree against the father, the first defendant is entitled, in order to obtain satisfaction of that decree, to seize any property of the father which he can find, and to sell it whether it be in the condition of joint or several property. But he is not, we think, simply upon that footing entitled to put

his hand upon the joint property of the family governed by Mitakshara law, of which the father is the head, for the purpose of altering its condition by division and sale. Still we also think that if he could, in a regular suit brought for the purpose, show to the Court that there was no property belonging to the father which he could find or reach other than the property in which the father was interested jointly with his sons as a joint Mitakshara family, he would have a right to stand so far in the shoes of the father as to be able to insist upon such a partition of the property as might enable him, so to speak, to procure for the father something wherewith afterwards to satisfy his own decree in due course of execution proceedings. And, similarly, even in the present case, assuming that he, in the first instance, *bonâ fide* seized this joint family property under the belief that it belonged to the father, and sold it in order to satisfy his decree, probably he might successfully resist the claim of the sons to get it back in its integrity, if he could show that there was no other property belonging to the father to which he could have recourse; and that he consequently had, as we have endeavoured to explain, a right founded in equity at least to have this property divided, and so made available for being seized and sold. But no facts of this kind have been proved in this case. They have not even been set up,—and for a very good reason: as long as the property which was pledged by the bond remains untouched, it would be difficult for the judgment-creditor to say that there was no other property of the father besides this, which is the subject of suit, to which he could have recourse. Inasmuch as the father pledged that property, as against him it must be taken that he had a right to pledge it; and until that right is questioned by the sons, it cannot be assumed that the judgment-creditor would not be able to realize his debt out of that property, if he proceeded against it. It thus appears to us that, on the second ground also which we have mentioned as a possible ground for resisting the plaintiff's claim to recover the property in its entirety, the defendant has failed in this suit.

The result is that we think the plaintiff has made out his right to recover this property for the benefit of the joint family.

It was suggested to us just now that a portion of the property was a separate property of the father himself, acquired by him out of his own funds, and it seems that the first Court adopted this view of the facts.

The Lower Appellate Court, however, has come to no finding on the point, and if there was any evidence on the record tending to show that this property was the father's separate property, we ought to send the case back to the Lower Appellate Court for trial of this issue. We find on enquiry, however, that there is no such evidence. It would be therefore useless to send the case back for this purpose.

We reverse the decision of the Lower Appellate Court, and decree that the plaintiff do recover the property which is the subject of suit for the benefit of the joint family.

The plaintiff must have his costs in all the Courts.

The 14th June 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Mortgage—Foreclosure—Extension of Time—Notice.

Case No. 104 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 15th January 1872.

Brijo Mohun Sutputty (Defendant)
Appellant,

versus

Radha Mohun Dey (Plaintiff) *Respondent.*

Baboos Hem Chunder Banerjee and Sreenath Doss for Appellant.

Baboos Kalee Mohun Doss, Romesh Chunder Mitter, Rash Beharee Ghose, and Ram Chunder Mitter for Respondent.

Where a mortgage becomes foreclosed, and the mortgagee abstains from enforcing his right and allows the mortgagor an extension of time, it is not necessary that a fresh notice should be served.

Couch, C.J.—As to the first objection that there ought to have been a fresh notice in consequence of the extension of time for the payment of the money, we think the extension of time, which was by an agreement of the plaintiff to abstain from enforcing the right which he had acquired by having given a notice, and giving the mortgagee further time to pay the money, did not render it

necessary for him to serve a fresh notice. The mortgage had become foreclosed, and there was not either a revival of the mortgage or a substitution of another mortgage. It simply amounted to the mortgagor saying, "I will give you further time. If you pay within the specified time, I will not enforce the right which I have now got by the money not having been paid."

Then as to the second objection, that it does not appear that this money was borrowed for purposes which would make it a charge upon the property, the present appellant is not at liberty to take it. The parties who might take that objection and say that the mortgage did not constitute a valid charge upon the property as against them, have not appealed. They do not complain of the decree of the Subordinate Judge. The mortgagor having represented to the mortgagee that the money was wanted for a particular purpose, and the mortgagee having lent the money upon the faith of that representation, the mortgagor is not at liberty to say now that the money was not borrowed for that purpose.

The third objection is that the transaction was a fictitious one; that there was not a real mortgage, but the plaintiff and defendant agreed together to concoct this apparent mortgage to defraud some other person, or as it is called to protect the estate.

When the defendant has executed a mortgage containing the statements which there are in this, it would require every strong evidence as between him and the plaintiff to induce the Court to find that all this is false, and that the transaction was fraudulent.

Instead of there being strong evidence of it, only two witnesses are called whose evidence is really worthless. Both are servants of the defendant, the present appellant, and he has not himself come forward to support the case which he now presents to the Court. Certainly, it was not for the plaintiff, who had plenty of evidence to rely upon, to call him; it was for him to come and prove, if he could, that the statement which he had made in the deed was false, and the transaction was as he said a fraudulent one. He has not done that. Apart from the evidence which the plaintiff has given supporting the transaction, the defendant's case has entirely failed. The burden of proving what he alleged was upon him, and there is really not the slightest ground for giving him a decree.

The appeal must be dismissed with costs.

The 16th June 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Damages—Defamation—False Accusation—
Issues.*

Case No. 1877 of 1872.

*Special Appeal from a decision passed by
the Subordinate Judge of Sarun, dated
the 8th August 1872, reversing a decision
of the Officiating Moonsiff of Sewan,
dated the 2nd June 1871.*

• Gunga Pershad (Plaintiff) *Appellant,*

versus

Ramphul Sahoo (Defendant) *Respondent.*

*Baboos Romesh Chunder Mitter and
Taruck Nath Paleet for Appellant.*

*Baboo Mohesh Chunder Chowdhry for
Respondent.*

In a suit for damages on the ground that defendant made a false charge of defamation against plaintiff and had him arrested and taken before the Magistrate who dismissed the charge, HELD that the essence of the case lay in the question whether or not the complainant had reasonable ground for complaining before the Magistrate that the plaintiff had defamed him. Malice would be inferred from the absence of reasonable cause.

Phear, J.—THE plaintiff's cause of action is that previously to the bringing of this suit the defendant made a false charge of defamation against him before the Magistrate, and caused him to be arrested on this charge and to be brought before the Magistrate; that the Magistrate after taking evidence dismissed the charge; and that the defendant took this action against him maliciously and without any reasonable and probable cause for so doing.

The first Court has given a decree in favor of the plaintiff with damages at Rs. 100.

The Lower Appellate Court has reversed this decree upon the ground that the plaintiff in his plaint and evidence had disclosed no cause of suit.

It is rather remarkable, we think, that neither Court appears to have seen what was the issue upon which the suit ought to be tried. The Lower Appellate Court seems to be of opinion that no damage was done to the plaintiff, and that consequently he had no cause for suing the defendant. Now, it is quite clear, we think, that the cause of suit was simply the fact that the defendant had

intentionally done a wrongful act by reason of which the plaintiff received damage. It was a wrongful act to accuse the plaintiff falsely of a criminal charge before the Magistrate if the accuser at the time had no reasonable cause for making the accusation. And it was damage to the plaintiff even that he should be arrested; it was still further damage to him to be detained in custody; it was again further damage, presumably, to his reputation that he was wrongly accused of a criminal charge. And it would be another item of damage that he incurred expenses, if he did incur expenses, in defending himself from that charge. On the case as laid by the plaintiff there is certainly ample damage shown to entitle him to a decree. But the essence of the whole case between the parties lay in the question whether or not the defendant had reasonable ground for complaining before the Magistrate that the plaintiff had defamed him. If he had reasonable ground for laying an information of that kind before the Magistrate, his act was not wrongful, although it did in fact produce damage and inconvenience to the plaintiff; because, as has been more than once said in this Court, every man has a right to have recourse to the Criminal Courts to prosecute another for a criminal offence, if he has a reasonable cause that that criminal offence had been committed. If, on the other hand, he has not reasonable cause for making such prosecution, he must stand the consequences of a civil action, for he incurs the liability to recompense the person whom he prosecuted.

Now, here neither the first Court nor the second Court appears to have in the slightest degree directed its attention to the question whether or not there was reasonable and probable cause for the defendant's preferring the charge of defamation against the plaintiff before the Magistrate. No issue of that kind was raised in the first Court, or in any the remotest degree referred to by either Court in its judgment. The nature of the cause of action in a suit of this character ought by this time to be understood by the Civil Courts, for it has been dealt with in the decisions which are reported in XI Weekly Reporter, 42; XII Weekly Reporter, 276; and XVII Weekly Reporter, 283.

It is almost superfluous for us to add that the plaintiff, in order to succeed, must establish two principal points: *first*, that the prosecution terminated favorably to himself; *second*, that the defendant had not reasonable or probable cause for making it. Malice

will be inferred from absence of reasonable cause.

In the present case, it is perhaps proved that the proceedings before the Magistrate terminated favorably to the plaintiff; but there is no evidence to show absence of probable cause, and no issue was raised upon the point. It seems to us that the case cannot properly be determined between the parties without the trial of this issue.

We think, therefore, that the decree of the Lower Appellate Court should be reversed, and the case sent back to that Court for retrial with direction to that Court to raise an issue as to whether or not there was reasonable and probable cause for the defendant's action in prosecuting the plaintiff, and to send that issue down to the first Court in order that the parties may adduce evidence upon it.

Costs will abide the event.

The 16th June 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Usufructuary Mortgage (Zur-i-peshgee Ijarah)
— *Onus Probandi*— *Right of Sale.*

Case No. 1629 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 8th June 1872, affirming a decision of the Moonsiff of Gya, dated the 10th December 1872.

Mussamut Majeedunnissa (Defendant)
Appellant,

versus

Syud Dildar Hossein and others (Plaintiffs)
Respondents.

Moonshee Mahomed Yusoof for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

In a suit in which plaintiff prayed for the sale of property which had been mortgaged to him as security

for a loan, under a zur-i-peshgee ijarah lease, and of which he had been dispossessed by defendant under color of a decree, it was HELD that as plaintiff had had for a great many years the usufruct of the land for the very purpose of repaying himself principal and interest of his loan, the burden was on him to show that there was anything remaining due to him, and that the *onus* also was his to prove that the ijarah gave him the right to sell the property upon some contingency.

Phear, J.—THE plaintiff says that in Jeit 1234, Ahmed Ali, his father, and Seebun Sahoo advanced the one Rs. 300, and the other Rs. 100, to the ancestor of the present defendant, and took as security and as means of re-payment a zur-i-peshgee ijarahnamah of the property which is the subject of suit. He says that his father before him, and on his father's death, he himself, held the property under this ijarah up to the 11th Srabun 1270 (a very considerable period of time indeed), and that he was then dispossessed by the defendant under color of a decree which the defendant had got for possession of other property. In this suit he complains that that dispossession was a wrongful act, and says that he has not yet been repaid the principal sum advanced and the full amount of interest due thereon.

He puts in a statement of the profits which he received during the period of his possession of the property, and makes out that there remains still due to him the whole amount of Rs. 400 for principal, together with a sum of Rs. 399 odd in respect of interest, and he asks for a decree against the defendant for this amount of money, and also that it may be realized by the sale of the mortgaged property.

He does not put into Court the original zur-i-peshgee lease by which he says the property was mortgaged to his father and Seebun Sahoo, nor does he put in a copy of it. The Judge of the Lower Appellate Court says that he has found a reason for the absence of the original. But we have not been told what the reason was. The plaintiff gives no evidence whatever of the contents of that document; and he relies entirely upon the admission which he says is contained in the defendant's written statement as to its effect. Now it is obvious at once that before the plaintiff can succeed in this suit, he must give some *prima facie* evidence at least of the amount which is due to him under the terms of that original

ijarah lease. And he must also give some evidence to show that that ijarah lease by its terms charged the mortgage debt and interest upon the property, or in some mode gave him a right to sell the property upon some contingency for the purpose of realizing the debt secured by it. But the written statement of the defendant upon which he is reduced to rely for both these purposes, does not afford evidence either of the rate of interest reserved on the loan, or of his having a right under the ijarah lease to sell the property. The only thing that can be found in the defendant's written statement is an admission that the ijarah transaction was a mortgage transaction, and that the plaintiff and his predecessor had a right and were bound to discharge the mortgage debt by the usufruct of the property of which they took possession.

Now we need hardly say that the fact of admitting that the ijarah lease was a mortgage transaction does not of itself go so far as to involve the further admission that there was a power of sale given to the ijaradar by the ijarah lease.

In a case reported in XIII Weekly Reporter, page 446, a Division Bench of this Court had occasion to remark that, although it is true that leases of this kind are spoken of as usufructuary mortgages, and that the parties to them have generally to some extent the rights of a mortgagor and mortgagee, still it does not follow that in every case of this kind the lessee is entitled to have the property sold. So here, in the case before us, it does not follow that, because the defendant in his written statement called the ijarah lease a mortgage transaction and spoke of it as an usufructuary mortgage under which the mortgagee had a right to take the profits of the land, and was bound to pay, himself off with them so far as they went, it does not follow that he intended it to be implied from his words that there was a power of sale in that ijarah lease given to the mortgagee; and unless the admission of the defendant is carried to this length, the plaintiff really is without any evidence whatever in this suit to prove that he has any right under any circumstance to come into Court to ask for a sale of the property which was mortgaged, as it is termed, to his father and Seebun Sahoo in Jeit 1234. So that clearly, we think, the plaintiff's claim upon which he asks to have his debt due to him realized by sale of the property fails entirely.

and just as clearly it seems to us the plaintiff has failed to prove that there is any money due to him. By the admission of the defendant, his, the plaintiff's father, and Seebun Sahoo had advanced Rs. 400; and if the matter had stood there, probably it would be right to say that the burden of proving that this money and reasonable interest on it had been repaid, would lie upon the defendant. But the defendant further adds, as indeed was the case of the plaintiff, that the plaintiff had for a great many years had the usufruct of the land for the very purpose of repaying himself the principal and interest; and therefore the burden lay upon him to show now that there was any thing remaining due to him. On these facts it was incumbent on him as plaintiff to show that the principal with interest was not over-topped by the profits which he has received. But in order to do that it is essential for him to show what the interest was. The Lower Appellate Court has come to the conclusion that the interest reserved in the original ijarah lease was, upon all the probabilities of the case, 12 per cent. Whatever the *probabilities* may be, it is also quite *possible* that the interest was not 12 per cent. And it lay upon the plaintiff to make out by evidence what the interest was by evidence, and not by probabilities. If the interest was 6 per cent., and not 12 per cent., we think there would be no question made that the whole principal and interest had been paid off during the time that the plaintiff was in actual possession of the land. Thus it appears that it was matter of importance as regards the establishing of the plaintiff's claim to the money alone that he should show what was the rate of interest which was stipulated for by the ijarah. He has not done that; and consequently it seems to us, not only has he failed to establish a right to have the property sold, but he has failed also to make out that there is any debt due to him for which he could ask to have the property sold.

Thus it appears to us that the judgment of both the Courts below is erroneous upon the ground that there is no evidence on the record to support the judgment. And consequently the decree of the Lower Appellate Court must be reversed, and the plaintiff's suit dismissed with costs in all the Courts.

The 16th June 1873.

Present:

The Hon'ble Louis S. Jackson and
Dwarkanath Mitter, *Judges.*

Review—Jurisdiction.

Case No. 1533 of 1872.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 3rd July 1872, reversing a decision of the Moonsiff of Ghattal, dated the 8th February 1871.

Burra Fukeer Doss Bera (Defendant)
Appellant,

versus

Fukeer Doss Bera (Plaintiff) *Respondent.*

*Baboos Umbika Churn Bose and Mohendro
Lall Mitter for Appellant.*

Mr. R. T. Allan for Respondent.

The inferior Courts in the mofussil have no jurisdiction to review their own judgments except under the circumstances and with the limitations set forth in the Code of Civil Procedure.

Jackson, J. — THE decision of Mr. Thompson, the Subordinate Judge of Hooghly, against which this special appeal has been preferred, is a decision made without jurisdiction. The appeal had been heard by Baboo Grish Chunder Ghose, who was then holding the office of Subordinate Judge, and while he retained that office an application for review was presented. That application came on several times for hearing, and was finally disposed of on the 30th

December 1871 by an order of Mr. Thompson, who had by this time resumed the charge of his office, to the following effect:—"Application for review rejected. "Rs. 10 are allowed as pleader's fees to the "opposite party." After this a further application was made to the same Judge, Mr. Thompson, on the 18th April, that is to say, some three months and nineteen or twenty days after the previous order, and on that application Mr. Thompson recorded the following order:—"Let notice "be served on the respondent to show cause." Subsequently, on the 15th June, Mr. Thompson passed this order:—"As Baboo "Grish Chunder Ghose, when officiating for "me, allowed notice to be served on the "opposite party to show cause, and petitioner "had originally obtained a decree in her "favor, and has offered further documentary "proofs which she has shown she could not "earlier produce, the application for review "is granted, and a day ordered to be fixed "for rehearing and trial." Mr. Thompson appears rather singularly on this occasion to have forgotten his own order made in December, and to have supposed himself to be dealing with the original application for review, whereas in truth what he had before him was a petition to review his own previous order. The inferior Courts in the mofussil have no jurisdiction to review their own judgments except under the circumstances and with the limitations set forth in the Code of Civil Procedure. The power to review their judgments was not originally vested in those Courts which, until the passing of Act VIII of 1859, could not review their decisions otherwise than with the sanction of the superior Court. The Lower Appellate Court was, therefore, bound to confine itself strictly to the provisions of the law. The second application, therefore, could not have been properly admitted by Mr. Thompson unless he were first satisfied that the petitioner had good ground for the delay in submitting it, more than ninety days having elapsed. It is probable, as we have already pointed out, that Mr. Thompson was really unaware of the fact, and inadvertently imagined himself to be dealing with an application presented within time. The special appeal is allowed, and the judgment of the Lower Appellate Court set aside with costs.

The 17th June 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Evidence of Forgery.

• Case No. 235 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 28th June 1872.

J. P. Wise (one of the Plaintiffs) *Appellant*,

versus

Radha Gobind Shaha (Defendant)

Respondent.

Mr. J. T. Woodroffe and Baboos Kalee Mohun Doss and Ram Chunder Mitter for Appellant.

The Advocate-General and Mr. R. T. Allan and Baboo Lall Mohun Doss for Respondent.

Where a deed has been proved and attested in due form, a Court is not justified (without any evidence of its fabrication) in finding from such circumstances as inadequacy of the consideration money that the deed has been fabricated.

Where a person asks to have a deed which is said to have been executed by him declared to be a forgery, he ought to present himself for examination.

Couch, C.J.—THE plaintiffs in this suit asked to have it declared that a deed which is said to have been executed by the second plaintiff is a fabricated one. This deed was registered, and has been acted upon so far that a settlement has been made by the Government with the defendant.

The Subordinate Judge, a Mahomedan gentleman, says that the deed, which was produced by the defendant, has been proved and attested in due form; and Mr. Woodroffe, the appellant's counsel, has told us that he is correct in that statement. The Judge also says that the plaintiffs have not adduced any evidence to show that Nuzzer Ali did not execute the deed, and it is admitted that there was no direct proof on the part of the plaintiff of this. But it is put to us, as it seems to have been put to the Subordinate Judge, that although there was no such evidence the Court is to find from various circumstances, such as the inadequacy of the consideration and the attachment which the defendant caused to be made in execution of a decree against Ghaziooddeen, that the deed is fabricated.

We think the Subordinate Judge would not have been justified in saying upon such grounds without any evidence that the deed was not executed, that it was a forgery; and this Court which is asked to say that his decision is wrong would not be justified in doing so.

One of the plaintiffs who is said to have executed the deed has not thought fit to give any evidence on the subject. It is true there is a statement in the plaint, but that cannot be considered as sufficient or as rendering it unnecessary for him to give evidence in the suit. We do not know what reasons there may be for his not coming forward; but whatever his reasons are, we think that where a person asks to have a deed which is said to have been executed by him declared to be a forgery, he ought to present himself for examination, and if he does not, he can scarcely expect that his statement in the plaint will be believed by the Court. We do not mean to say that there may not be cases in which evidence of the fabrication of a document may be so strong as to render the calling of the person who is said to have executed it unnecessary; but this is not one of those. If we were in this instance to say that this deed was forged, we should be doing in our opinion what has been reprobated by the Privy Council. We should be acting not upon evidence, but upon suspicion, and be speculating as to the truth instead of deciding according to the proof in the case.

The appeal must be dismissed with costs.

The 17th June 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Chur—Partition—Jurisdiction—Regulation XIX of 1814 s. 3.

Case No. 1035 of 1872.

Special Appeal from a decision passed by the Judge of Moorsheedabad, dated the 8th April 1872, affirming a decision of the Subordinate Judge of that district, dated the 20th July 1871.

Ranee Shama Soonduree Debia (Plaintiff)
Appellant,

versus

Koor Puresh Narain Roy and others
(Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Unnoda Pershad Banerjee for
Respondents.

Regulation XIX of 1814 s. 3, which requires that the partition of estates paying revenue to Government should be executed under the supervision of the Collector, applies only where there is a revenue payable to Government, which must be apportioned when a division of the estate is made. It does not apply where, in making a division of the property, it is unnecessary to apportion the revenue, it being already apportioned and payable by each of the owners of each of the parts of the original estate. A suit for partition in such a case may be entertained by the Civil Court.

Couch, C.J.—THIS suit was brought to obtain a division of a chur in which the plaintiffs and the defendants were co-sharers. It does not appear upon the judgment, but it is admitted, that the chur in question had been formed by accretion to the lands of the plaintiff and defendants, and by a decree made in 1864 the parties had been declared to be jointly entitled to the whole of the chur. It appears that the chur was not subject to any separate revenue payable to the Government, but the owners of the different estates to which the land had accreted paid revenue for their estates, and that appears to have been considered as payable in respect of the chur also.

The Subordinate Judge decided that the suit could not be brought in the Civil Court and accordingly dismissed it, holding that Regulation XIX of 1814 applied to the case. Then it came before the Judge on appeal,

and he held on the authority of a decision of this Court, reported in XV Weekly Reporter, page 242, that the judgment of the Subordinate Judge was right, and dismissed the appeal.

From his judgment it would seem that he inclined to the opinion that the suit would lie in the Civil Court, but felt himself bound by the decision of this Court which he supposed applied to the case.

The language of Section 3 Regulation XIX of 1814 is that the division of every zemindary, independent talook, or other estate paying revenue immediately to Government, which may be ordered to be divided into two or more distinct estates, and the apportioning of the fixed jumma on the whole of the estate on the several shares, are to be executed under the superintendence of the Collector of the district in which the estate may be situated. This Section appears to be intended to apply to cases where there is a revenue payable to the Government which must be apportioned when a division of the estate is made. The division would not be complete if the owner of each share remained liable for the whole of the revenue, and the object seems to have been to provide a mode of apportioning it at the time of the division so as to make each part of the estate bear its share of the revenue. There it is certainly not only reasonable, but most desirable, that the division should be made by the revenue officer.

But that reason does not apply where, in making a division of the property, it is unnecessary to apportion the revenue, it being already apportioned and payable by the owners of each of the parts of what we may call the original estate to which the chur has accreted.

The present case does not appear to us to come within the design of this Regulation. The division of the property may be ordered by the Civil Court, and under the provision of the Code of Civil Procedure, Section 225, the Collector will make it as being probably the most competent officer to do so.

We do not think what the Judge says about there being no express prohibition to the suit being brought in the Civil Court is of any weight, because, without an express prohibition, if the case came within the scope of the Regulation the suit would have to be brought in the Revenue Court.

The decision in the XV Weekly Reporter upon which the Judge relied does not, we think, apply to such a case as the present. The judgment, which is very short, was

given by Mr. Justice Mitter, who said :—
“We do not think it necessary to express any opinion upon the various grounds taken in this petition of special appeal. It is admitted that the real object of this suit is to obtain a division of the lands of an estate paying revenue to Government. But the power of making such a division is vested exclusively in the revenue authorities.” That is only in effect that in a case which comes within the Regulation, that is, the division of an estate paying revenue to Government, the division must be made by the Revenue Court; but the question here is whether this chur is an estate of that description. It appears to us that it is not. Both Courts were wrong in holding that the suit cannot be entertained by the Civil Courts, and the decrees must be reversed and the case remanded for re-trial. The cost will follow the result.

The 17th June 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Receipt of Rent—Disturbed Possession—
Evidence.*

Case No. 1204 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Cuttack, dated the 1st April 1872, reversing a decision of the Subordinate Judge of that district, dated the 27th March 1871.

Pudar Bindoo Mahantee (Plaintiff)
Appellant,

versus

Mohesh Chunder Sen (one of the Defendants)
Respondent.

*Baboo Mohendso Lall Mitter for
Appellant.*

*Moulvee Syud Murhumut Hossein and
Baboo Bykhunt Nath Paul for Respondent.*

Receipt of rent is good evidence of possession; but it does not necessarily follow that a party in possession

has been disturbed because he cannot prove that he has collected rent of a particular portion of the property.

Markby, J.—We are unable to concur in the view which the District Judge has taken of the order of 20th September 1856, upheld in appeal on the 12th December 1856, and carried out on the 12th March 1857.

It appears to us that this was in effect an order to put the appellant in possession of the entire plot consisting of 5 beegahs 7 cottahs 14 chittacks. No boundaries are given except those of the whole plot, and it was not an order to give possession of one beegah, but an order which could only be carried out by seeing that the appellant had possession of the whole 5 beegahs 7 cottahs 14 chittacks within the boundaries stated. We think, therefore, that it must be taken as a fact in this case that the plaintiff was in possession of the whole 5 beegahs 7 cottahs 14 chittacks on the 7th March 1857.

The statute of limitations would not begin to run until this possession was again disturbed, and the Court below must find whether or no that disturbance took place. This is the question to be tried, and not whether the plaintiff received rent for this particular beegah. Receipt of rent is good evidence of possession; but it does not necessarily follow in every case that a party in possession has been disturbed because he cannot prove that he has collected rent of a particular portion of the property. The allegation of the plaintiff is that the disturbance did not take place until Joystee 1277. It is not always easy to prove the exact date of dispossession of a small piece of land like this, but the Judge must ascertain as well as he can whether it took place more than twelve years ago. If it did not, then the statute of limitations will not apply, and the Judge will have to consider whether there is any ground for disturbing the decision of the Moonsiff that the appellant has established the superior title.

The case will be remanded for re-trial accordingly.

The 17th June 1873.

Present :

The Hon'ble Louis S. Jackson and
Dwarkanath Mitter, *Judges.*

Oral Evidence—Documentary Evidence.

Case No. 1748 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 29th June 1872, reversing a decision of the Moonsiff of Ghattal, dated the 16th December 1871.

Khettur Mohun Audhikaree and another
(Plaintiffs) *Appellants,*

versus

Gireedhur Ghorrye (Defendant) Respondent.

Baboos Nil Madhub Bose and Jadub
Chunder Seal for Appellants.

Baboo Obhoy Churn Bose for Respondent.

A plaintiff who denies the execution of a document relied on by the defendant, and seeks to repudiate it altogether, is at perfect liberty to adduce oral evidence in support of his contention.

Jackson, J.—We think the judgment of the Lower Appellate Court in this case cannot be supported. It is a matter of regret that the judgment of the Court of first instance should have been set aside on appeal on such very unsatisfactory grounds as the Subordinate Judge has assigned. The plaintiffs alleged that the lands which they sued for had been mortgaged by their mother to the defendant in 1264 while they were minors, and that in 1276 they sought to recover possession on the ground that the mortgage deed had been fully satisfied; but the defendant then set up a purchase from the plaintiffs themselves and refused to give up the land, whereupon this suit was brought in 1278. It appears that the Moonsiff came to the finding, and that finding has not been set aside by the Lower Appellate Court, that at the time, that according to the defendant's allegation, the plaintiffs sold this land, they were two of them under age, the eldest being eleven or twelve years of age. The Moonsiff accordingly found the alleged sale to be untrue. For that and for other reasons, and believing the plaintiffs' case to be true, he gave them a decree. One of the grounds of the Moonsiff's judgment was that the kobalah set up by the defendant purported to have been registered in the book of the kazeer at that time, and that, on reference to the kazeer's book, the

registration appeared to be a year subsequent to the alleged sale, and in several particulars the copy in the book varied from the document produced in Court.

The case coming before the Subordinate Judge on appeal, he makes these observations:—"There being no other means left for the plaintiffs to disprove the plea of limitation, and to establish their claim, other than the adducing of oral evidence, it appears that the witnesses whom the plaintiffs have examined to establish the said fact are professional witnesses, and state that they do not remember how many times they have given their evidence, and that they cannot give the number. So that no reliance can be placed on the evidence of such witnesses." It has not been attempted before us to justify this comment on the witnesses' testimony, but it is suggested that we are bound by the opinion of the Lower Appellate Court upon this point, and that we ought not to bind the conscience of the Subordinate Judge in respect of the belief which he has given to the evidence of these witnesses. If we were not told for what reasons the witnesses were disbelieved, but the Subordinate Judge had simply disbelieved them, it is possible we might have called upon him to state his reasons, or might have affirmed his judgment with the observation that it was not very satisfactory; but when a reason is assigned which has no foundation in the facts of the case, we think we are no way bound to affirm the judgment founded on such a reason. In point of fact, there is no ground for stating that the witnesses were professional. If they had been so, the local Moonsiff who tried the case was much more likely to be aware of the fact than the Subordinate Judge. But the observations which follow in the judgment of the Lower Appellate Court show that he went upon an entirely different ground in rejecting this testimony. He says:—"It has been authoritatively settled by the late Sudder Court and by the High Court in the cases noted in the margin, as also in several other cases, that, when one party alleges the mortgage of any land, and the other the purchase of it under a kotalah, the oral evidence adduced by the plaintiff cannot be accepted as against the documentary evidence adduced by the other party." We should be very sorry if it were supposed that either the late Sudder Court or the High Court had laid down any such monstrous proposition. This is not a case in which the parties, or either of them, have sought to adduce oral

evidence to vary the conditions of a written document. The plaintiffs rely on one document and the defendant on another, and it is the object of each of them to prove his own deed to the satisfaction of the Court. The plaintiffs entirely deny the execution of the document on which the defendant relies, and do not seek to vary its meaning, but repudiate it *in toto*. It is clear, therefore, that no satisfactory finding—one which this Court can respect—has been arrived at in respect of the mortgage set up by the plaintiffs. On the other hand, we have the allegation of the defendant of a sale said to have been made by the plaintiffs at a time when they were confessedly under age. In that state of things, it seems to us that the plaintiffs need hardly give a very strict proof of their allegation, and although it is impossible to resist the conclusion that the defendant's statement is untrue, still it is necessary that the Court should pronounce upon the evidence filed, and upon more satisfactory grounds, whether the plaintiffs' allegation is true or no. The case must, therefore, go back to the Lower Appellate Court, but we think it necessary under the circumstances to make an order which we seldom, and then with great reluctance make, that this case should be taken up by the District Judge in his own file, and should be decided by him.

The 17th June 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Air and Light—Prescriptive Right.

Case No. 1916 of 1872.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 19th August 1872, affirming a decision of the Moonsiff of Serampore, dated the 22nd January 1872.

Kalee Dass Banerjee (Defendant) *Appellant*,
versus

Bhoobun Mohun Doss (Plaintiff)
Respondent.

Baboos Hem Chunder Banerjee and Bama Churn Banerjee for Appellant.

Baboo Umbika Churn Banerjee for Respondent.

Plaintiff having purchased one portion of a piece of ground on which stood a dwelling-house, defendant

about the same time obtained a gift of another portion. Plaintiff pulled down the old house, and built a new one on the same ground, and defendant also built a house on his land. Plaintiff thereupon complained that, on his opening windows, defendant raised a wall whereby his air and light were obstructed. The Lower Courts gave him a decree requiring defendant to remove the front of a certain window, and clear the passage of air and light:

Held that plaintiff had no right which would justify the decree; any prescriptive right which the old house may have conferred having disappeared with the construction of the new one.

Jackson, J.—It appears to us that the decisions of the Courts below in this case cannot stand. The plaintiff purchased part of a piece of ground on which stood a dwelling-house, and about the same time the defendant also obtained a gift of another portion of the same piece of land. The plaintiff pulled down the old house and built a new one upon the same ground, and the defendant also built a house upon the land which he had acquired. The plaintiff thereupon complained that, on his opening windows in the house newly-built, the defendant raised a wall whereby his air and light were obstructed.

The Moonsiff gave the plaintiff a decree requiring the defendant "to remove the wall from the front of the window kept in the southern direction of the first story of the plaintiff's room on the remote east, and to clear the passage of air and light," and this decision has been affirmed on appeal by the Subordinate Judge.

It appears to us that the plaintiff had no right upon which such a decree could be justified. Whether or not there could have been any remedy if the old house had been in existence, it appears to us that, with the construction of the new house, the prescriptive right of the plaintiff, if any, disappeared. Besides, it appears that both the parties derived their title from one and the same person, and so long as the occupation of the latter continued the possession could hardly be adverse to the defendant. It seems to us, therefore, that under the circumstances neither party had the right of throwing obstacles in the way of the other in erecting houses, &c., on his own land. We think the plaintiff's suit ought to have been dismissed. The decisions of the Lower Courts are accordingly reversed, and the plaintiff's suit is dismissed with costs of this Court and of the Courts below.

The 18th June 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Enhancement of Rent.

Case No. 20 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 17th September 1872, affirming a decision of the Moonsiff of Ghattul, dated the 23rd September 1871.

Juggessur Patty (Defendant) *Appellant*,

versus

Ishan Chunder Ghose and others (Plaintiffs)
Respondents.

Baboo Bama Churn Banerjee for
Appellant.

Baboo Taruck Nath Dutt for *Respondents.*

A zemindar who brings a suit specifically to recover rent at an enhanced rate is not entitled, on failure of his alleged grounds of enhancement, to obtain a decree for rent at the rate admitted by the defendant.

Jackson, J.—It appears to us that the Lower Appellate Court was quite right in holding that the notice was bad. The landlord, pretending to comply with the provisions of the law in regard to the service of notice, merely addressed to the ryot a document in which all the possible grounds of enhancement are mingled in a confused way, so that it was impossible for the ryot to know what case he had to meet, and as to the several grounds which the landlord endeavoured to make out he signally failed. The Judicial Committee of the Privy Council has lately held that,* where a zemindar brings a suit specifically to recover rent at an enhanced rate, he is not entitled, on failure of his alleged grounds of enhancement, to obtain a decree for rent at the rate admitted by the defendant, the two suits being essentially different in character. Under the circumstances of the case, therefore, we think that the plaintiff's suit ought to be entirely dismissed with all costs.

* 19 W. R., p. 141.

The 18th June 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Hindoo Law—Alienation by Widow—Rever-
sioner's Power of Voidance.*

Case No. 1115 of 1873

*Special Appeal from a decision passed by
the Judge of Bhaugulpore, dated the 1st
May 1872, affirming a decision of the
Subordinate Judge of that district, dated
the 13th May 1871.*

Muteeram Kowar (Defendant) *Appellant,*

versus

Gopal Sahoo and another (Plaintiffs)
Respondents.

*Baboos Romesh Chunder Mitter and
Taruck Nath Dutt for Appellant.*

*Baboos Chunder Madhub Ghose and Kalee
Prosunno Dutt for Respondents.*

A widow is not trustee for the heirs, but has the whole of the inheritance in her with a limited power of alienation; her power of alienating for spiritual purposes being larger than that to which necessity gives rise.

An alienation by a widow is not void by reason of inadequate consideration; but is voidable by the heir upon his offering to pay the real consideration, and on certain other conditions being satisfied.

Phear, J.—AFTER giving consideration to this case, we are of opinion that the Rs. 900, the debt incurred for the Gya pilgrimage, and the Rs. 800, the debt incurred for the *Shradh*, by the widow, were

expenses to liquidate which it was within the power of the widow to alienate her husband's property. They are of the nature of expenditure for the purpose of procuring spiritual benefit for the husband; and it has been laid down by the Privy Council, and the doctrine has been constantly followed by this Court, that the widow's power of alienation for spiritual purposes is larger than the power of alienation to which necessity gives rise. It has been long settled that she is not, in any proper sense, trustee for the heirs: she has the whole of the inheritance in her with a limited power of alienation—a power of alienation which can only be exercised perhaps, we may say, in two classes of contingencies,—one class comprising cases of necessity, and the other class, cases of raising money for spiritual purposes.

In this view, it appears to us that the alienation was a good alienation, although it may be that the Rs. 1,700, which is the total of the two items to which we have referred, may have been an inadequate consideration for the sale: we suppose, indeed we must take it to have been an inadequate consideration, because the actual purchase-money was Rs. 4,000. Under these circumstances, the alienation is not void, but, as was expressed by the late Chief Justice in a case reported in IX Weekly Reporter, page 108, is voidable by the heir upon his offering to pay the real consideration (in this case it would be Rs. 1,700) together with reasonable interest thereon; and upon the further condition, of course, that the defendant should account for the rents and profits during the interval over which he had been in possession, both the interest and the account of rents and profits to run from the date of the widow's death.

We think, therefore, that the decrees of both Courts below, which have been passed in favor of the plaintiff without any qualification whatever, are wrong decrees, and must be reversed.

The plaintiff has not in this suit expressed his readiness to repay the defendant any portion of the purchase-money, but has sought to recover the property unconditionally.

Under the circumstances, we think that the right order will be to dismiss the plaintiff's present suit leaving him to any future remedy if he has any right to it.

The defendant, appellant, must have its costs in all the Courts.

The 19th June 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Right of Way—Non-user—Resumption.

Case No. 1425 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 12th June 1872, affirming a decision of the Moonsiff of Naraingunge, dated the 29th September 1871.

Raj Beharee Roy and another (two of the Defendants) *Appellants*,

versus

Tara Pershad Roy and others (Defendants) *Respondents*.

Baboos Doorga Mohun Doss and Nullit Chunder Sen for Appellants.

Baboos Chunder Madhub Ghose, Sreenath Banerjee, and Bykunt Nath Doss for Respondents.

Where a new way is substituted for an old one with the consent of the person entitled, and the non-user of the original way is accompanied by acts which warrant the Court in inferring an intention to release, the right of resumption is lost: the non-user need not extend over any defined period.

Couch, C.J.—It is a question of fact whether the plaintiff had abandoned the old way and adopted the new one which the defendant had offered in substitution for it. Whether the user of one or two, or five or six years, is sufficient to show an abandonment of the old way must depend on the various circumstances of the case, and is to be considered by the Court which determines questions of fact. It has been found here as a fact that the old way was abandoned. Although no issue was framed by the Moonsiff raising that question, his finding upon it was after both parties had given evidence on the subject, and it was not said in the appeal to the Judge that he ought not to have tried it without framing an issue, or that any evidence had not been received by him which ought to have been received. Where a new way is substituted for an old one with the consent of the person entitled, and the non-user of the original way is accompanied by acts which warrant the Court in inferring an intention to release, the right of resumption is lost, and the non-user need not extend over any defined period.

The appeal must be dismissed with costs.

The 19th June 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Remand—Error of Procedure—Special Appeal.

Case No. 1205 of 1872.

Special Appeal from a decision passed by the Additional Subordinate Judge of East Burdwan, dated the 22nd May 1872, reversing a decision of the Officiating Moonsiff of Mungulcote, dated the 26th June 1871.

Jugobundhoo Haldar and others (some of the Plaintiffs) *Appellants*,

versus

Sreenarain Mitter and others (Defendants) *Respondents*.

Baboo Umbika Churn Banerjee for Appellants.

Baboo Gopal Lall Mitter for Respondents.

An error of procedure on the part of a District Judge in remanding for trial a case which did not come within Act VIII of 1859 s. 351, instead of framing issues upon which it might have been tried, was HELD to be one for which a special appeal would not lie where it did not affect the decision of the case on its merits.

Couch, C.J.—In this case, the Judge instead of framing issues upon which the whole of the case might have been tried (as appears from his judgment to have been necessary), remanded the suit generally for retrial. It is not a case which came within Section 351 of Act VIII of 1859, and his remanding it in the manner he did was an error in procedure, but it is not an error which has affected the decision of the case on the merits, or could have affected it, because the judgment shows that, if he had proceeded under Section 354, he must have framed issues upon which the whole of the case would have been tried, and all the questions of fact determined by the first Court. There may have been an error, but it is not one for which a special appeal will lie. The ruling of this Court in the case in the II Weekly Reporter, page 181, is applicable, although there the contention was that he ought to have called for additional evidence under Section 355. The appeal must be dismissed with costs.

The 20th June 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Transfer of Lessee's Interest—Recognition by Zemindar.

Case No. 1467 of 1872.

Special Appeal from a decision passed by the Judge of Gya, dated the 29th June 1872, reversing a decision of the Subordinate Judge of that district, dated the 8th February 1872.

Nund Kishore Singh (Defendant) *Appellant,*
versus

Ranee Ismed Kooer (Plaintiff) *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory for Respondent.

Even where a lessee's interest is transferable, the landlord is not obliged to recognize a transfer, if the effect of so doing would be to defeat his own right of reentry.

Phear, J.—We think, in this case, that the zemindar was not obliged to recognize the transfer, even supposing the interest was transferable, if the effect of so doing would be to defeat his own right of reentry. We might almost say it would be an absurd consequence of his contract, if he were under the obligation to recognize the transfer. There would have been no use in making the stipulation in the pottah for the right of reentry if it necessarily could be in this way defeated. Then, not being obliged to recognize the transfer under the circumstances which we have mentioned, it is certain that in this case the zemindar did not do so. Consequently the transfer was at best incomplete, and this particular form of remedy for the landlord remained open to her. She now in this suit seeks to be allowed to reenter, to be put back into possession—in short, to eject the appellant, who is holding the land by virtue of the alleged transfer.

We think that she is entitled to a decree for ejectment against the appellant; but at the same time we are of opinion that she has no claim to recover from the appellant the amount of debt which accrued due from Muthoora before the transfer.

As against Muthoora, she is entitled to a decree for the arrears proved, namely Rs. 1,346-5-6; and she is also entitled to a decree for ejectment against Muthoora. The

plaintiff must have her costs, and interest upon the costs and arrears from the date of decree to date of realization.

The 20th June 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Mitakshara Law—Joint and Separate Property—Rule of Descent—Custom.

Case No. 40 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 11th October 1872.

Rajah Ram Narain Singh (Plaintiff)
Appellant,

versus

Pertum Singh and others (Defendants)
Respondents.

Mr. J. T. Woodroffe and *Baboos Romesh Chunder Mitter* and *Boodh Sen Singh* for Appellant.

Mr. C. Gregory and *Baboos Chunder Madhub Ghose* and *Nil Madhub Sen* for Respondents.

The distinction between joint and separate property under the Mitakshara law is of a temporary, not of an abiding character. Property is joint when it belongs to all the members of a joint family; and separate when it belongs only to one member. As long as it is separate and in the condition of self-acquired property, the holder has no one to consult in regard to the disposal of it except himself. But the moment it passes by descent into the hands of some one in the next generation, it becomes joint family property, and continues to go on by one rule of descent only.

If this individual dies without becoming the root of a joint family, the Mitakshara law gives an *interim* enjoyment of the property to his female representatives, and then transfers it to a collateral heir as the origin of a new joint family.

If property is so situated that it passes from one taker to another as if it were separate property, this result can only be brought about, if at all, by the operation of some custom or authority controlling the general Mitakshara law.

Phear, J.—WITH regard to the principal issue of fact in this case, we concur in the finding of the Lower Court. It appears to us that the granting of the ticca pottah and the execution of the bond were but two steps in one transaction by which the plaintiff's father secured to the bond-holder at least the

repayment of the interest stipulated for in the bond, by means of the rents reserved in the ticca lease. It is almost impossible, I think, to take any other view of the matter.

The story set up by the defendant, amounting really to a statement on the part of the bond-holder and the ticcadars, near relatives on intimate terms of association with each other as they were, that each was quite ignorant of the dealing of the other with the plaintiff's father, is entirely unworthy of credit. And then there is the very significant fact that the period of the lease just exceeds the period of maturity of the bond debt, if I may use the term—i. e., by two or three months only: 11 years was the period in one case, and 10½ in the other. We agree with the Subordinate Judge that this was one transaction, and we think that it has the character of a mortgage transaction to the extent which I have mentioned. It was therefore clearly, for the period during which the ticca pottah was expressed to endure, an incumbrance upon the estate.

We also think on the evidence which has been brought before us that the ticca rent reserved by the pottah was, as the plaintiff terms it, an inadequate rent. The jumma-bundee papers proved by the plaintiff's witness, the Patwaree, coupled with his own testimony, is *prima facie* evidence at any rate going to show that the assets of the property which was the subject of the ticca lease, amounted to somewhere about Rs. 4,000 per annum during pretty nearly the whole period; and this evidence has not been met by the defendants in any way whatever. It is obvious that, if this evidence was untrue, the defendants had the very best possible means in their power of showing that it was so. The ticcadars for some 9 years previous to suit had been the actual receivers of the rents and profits of this estate. They could have shown to a pice what it was that they realized during the whole of that period. They have in truth given no evidence as to the amount of rents and profits which they realized. To my mind, the conclusion is inevitable that the case of the plaintiff in this respect is a true one. I therefore think not only that the original transaction was a transaction having the character of a mortgage, a transaction which had for its purpose at any rate to secure to the bond-holder the payment of the interest due on his bond, but also that the ticca itself was a grant of a very beneficial character to the grantee. So that the grant, independently of its forming part

of the mortgage transaction, would be an incumbrance upon the estate. In other words, the incumbrance effected by the assignment of the ticca rent to secure the payment of the interest on the bond, was increased by reason of the inadequacy of that rent to the letting value of the property.

With this view of the facts of the case, it remains to be considered whether the plaintiff had a right to ask for possession and enjoyment of the property free of these incumbrances which his father had put upon it.

Thus we come to the question whether the father held and enjoyed the property with the incidental power of alienating or incumbering it as against his successors.

It is perhaps somewhat unfortunate that no issue of fact was distinctly raised in the Court below for the purpose of ascertaining the nature of the father's proprietary right in this property. But we have it asserted in the plaint, and not contradicted by the defendants, that the property in question had descended to the plaintiff's father from his father. It was, therefore, in the hands of the plaintiff's father an ancestral property as distinguished from a self-acquired property; and its incidents and the rules which would govern its descent would therefore be those prescribed by the general law of the land in that part of the country, namely, by the Mitakshara law, excepting so far as this might be controlled or overridden by the operation of an established custom or other special authority. And in the absence of any such exceptional disturbing force, I need hardly say that one of the incidents of ancestral property in the hands of the father (as I have just observed this property was), would be that he would have no power of alienation or of incumbering as against any members of the family who were joint with him in respect of this property.

Now admittedly the present plaintiff was born during the lifetime of his father and while the father had this property; and therefore by the Mitakshara law, if it operated uncontrolled, the plaintiff immediately became joined with his father as regards right to this ancestral property, and any alienation or incumbrance which the father at any time should make without his concurrence would be void as against him unless it was justified by family necessity.

In this way, I think, we have reached a point in the case at which we must enquire whether there has been any established custom, or any other established authority

proved, such as had the effect of overriding the general law, the Mitakshara law, which otherwise would govern the incidents and descents of this property.

Some such custom or authority has been made out to a certain extent, or rather we must take it that there is in this case something of the kind active. For the plaintiff in his plaint asserts that this property is impartible amongst the members of the joint family, and descends from the hands of the father to those of the eldest son, if he has sons, and so on: in other words, that it is not in any form divided or distributed in possession amongst the members of the joint family. This must be of course under the coercion, and as the effect of some authority external to the Mitakshara law. The defendant does not deny this: and consequently we must take that as a fact in the case. But that fact does not go further than the plaintiff has asserted it: it goes no further than the result which I have mentioned, namely, that this joint family property is not partible amongst the members of the joint family, but goes on the decease of the last holder to the hands of the elder member in lineal descent of the joint family. If, then, the custom or authority has this effect, and so far controls the general law, but does not go further, there must still remain the other incidents which I before drew attention to, namely, one amongst others, that the holder of the property cannot alienate any portion of it, excepting for a family necessity, without the consent of all the members of the joint family. It seems to me that, in arriving at this position, we have the authority of the Privy Council expressed in several judgments: in particular it is expressed in the judgment which is reported in XIII Moore's Indian Appeals,* on which Mr. Woodroffe very greatly relied yesterday. Another case, in which the like doctrine has been lately enunciated by a judgment of this Court, is reported in IX Bengal Law Reports, page 274.† One of the learned Judges of this Court who pronounced an opinion in that matter, differed in regard to the final result from the other members of the Court. But it seems to me upon the best consideration which I have been able to give to all the judgments reported in that case, that in reality he did not materially differ from the other Judges in his view of the principles

which ought to govern the case. He appears to have been of opinion that the property, which was there the subject of suit, did exist in the condition of separate property in the hands of every successive taker. It is possible, I think, that the facts and circumstances of the enjoyment of a particular subject of property may be such as to bring about this result; and probably a peculiar state of things in this respect will account for the special character of the judgment which was given by the Privy Council in the Tipperah case. There were some expressions thrown out by the Privy Council in the Tipperah case,* and by some of the learned Judges who gave judgment in the case reported in IX Bengal Law Reports, which seem to imply that there is a different law of descent in the case of what is termed a separate property from the law of descent in the case of joint property. I do not myself readily accept that law. The distinction between a joint property and separate property under the Mitakshara law appears to me to be simply of a temporary, not of an abiding, character. Property is joint when it belongs to all the members, who may be many, of a joint family. Property is separate when it belongs only to one member of a joint family alone, and not to the others jointly with him. As long as it is separate and in the condition of self-acquired property, the person who is the holder of it has no one to consult in regard to the disposal of it except himself. But the moment it passes from his hand by descent into the hands of some one in the next generation, it becomes joint family property—the property of several persons united together as a joint family with regard to it—the property of a new joint family springing from a new root. And it continues to go down by one rule of descent only.

As I understand the matter, there is substantially no different rule prevailing in the one case and in the other. It is simply the occurrence of a fresh starting point for a new joint family which makes the distinction between the two cases.

While the joint family endures, there is strictly speaking no question as to succession to the property. The joint family is a corporation in the sense of having a continuous existence notwithstanding the death of individual members; and it is now settled

* 12 W. R., P. C., 41.

† 17 W. R., 316.

* 12 W. R., P. C., 21.

that, under the Mitakshara law, no individual member of the family has any specific interest in the property, or the power of creating any for himself independently of the other members: he has only a right to insist upon a partition being effected at all. But by the nature of the case, the joint family must commence, and also must end, when it does end, in an individual who holds the property in a separate condition. If this individual dies without becoming the root of a joint family, the Mitakshara law gives an *interim* enjoyment of the property to his female representatives, when there are any, and then transfers it to a collateral heir as the origin of a new joint family. Thus the Mitakshara law itself does nothing to keep property in the condition of being the separate property of an individual throughout a series of takers, and indeed is hostile to such a state of things.

If, however, in any given case property is so situated that it does pass from one taker to another taker just in the same condition as if it were the separate self-acquired property of each of them personally, independently of the family element, then this result, I conceive, can only be brought about, if at all, by the operation of some established custom or authority controlling the general Mitakshara law. The Privy Council appear to have been of opinion in the Tipperah case, to which I have already alluded, that some result of this kind arose out of the state of facts before them. But in the case which is now before us, and in the other cases in this Court to which I have just referred, there is an entire absence from the facts of any authority or customs, if any there could be, which should have the effect of making the property separate property, and not joint family property, as it passes into the hands of the successive takers.

It appears to me then, on the facts with which we have to deal, that we must take the property which is the subject of suit to have been ancestral property, which descended with the joint family in the ordinary way subject to the effect of an established custom in regard to its partibility amongst the existing joint members of the family. And in this view of the facts, it is evident that the father had no power against his son, who was unquestionably joint with him as regards this property, to alienate or encumber the estate excepting upon a justification of a family necessity. No such ground justifying the father's deeds of 21st

and 22nd Assar has been even attempted to be proved.

The result to my mind is that the plaintiff is entitled to have it declared that the two deeds, the ticca pottah and the bond of the 21st and 22nd of Assar, had the effect of placing an encumbrance on the estate, and that the plaintiff was entitled to have possession of the property at the time of his father's death free from that encumbrance.

The plaintiff must have his costs in both the Courts.

Ainslie, J.—I concur.

The 20th June 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

*Joint Family Property—Alienation—Recovery—
Partition—Widow's Share.*

Case No. 209 of 1872.

*Regular Appeal from a decision passed by
the Officiating Additional Judge of
Tirhoot, dated the 20th June 1872.*

Mohabeer Pershad, for self and as Guardian
of Sheo Nundun Pershad, minor (Plaintiff)
Appellant,

versus

Ramyad Singh and others (Defendants)
Respondents.

*Baboos Kalee Prosunno Dutt and Nil
Madhub Bose for Appellant.*

*Mr. R. E. Twidale and Baboo Unnoda
Pershad Banerjee for Respondents.*

The father of a joint family, as its head, took in his own name a ticca lease of certain mouzahs, and to pay a part of the premium for it he borrowed a sum of money on the mortgage of the family property. The mortgagees suing on the bond obtained a decree, and in execution sold the property, purchased it, and entered into possession. The elder son then, for himself and a minor brother, brought a suit to set aside the bond and recover possession.

HELD that as no family necessity existed to justify the mortgage, and one of the members was a minor, the father alone could not alien:

HELD that the minor was entitled to a declaration that the mortgage, decree, and sale were void, and on that declaration to recover the property for the family; but that the mortgagees were entitled, in equity, as against the father and the elder brother (who had taken part in the proceedings) to insist upon their calling their shares into existence by partition and realizing them with a view to repayment of the loan with interest.

HELD that the widow was, upon the division, entitled to her share either by way of maintenance or as a portion of the inheritance.

The Court delivered the following judgment in this case on the 17th May 1873:—

Fhear, J.—In this case, Mohabeer Pershad, the plaintiff, for himself and as guardian of his full brother Sheo Nundun Pershad, a minor, both being sons of one Ram Anoogra Singh, sues Ramyad Singh, Sheo Adeen Singh, and Narain Singh, termed the first party defendants, and also his own father Ram Anoogra Singh termed the second party defendant, to recover possession of certain specified property, by setting aside a bond dated the 14th December 1867 and executed by the defendant second party (the father) in favor of the defendants first party, and also by setting aside an *ex-parte* decree passed on the 7th May 1870 upon the basis of the said bond, and an illegal auction sale effected on the 23rd November 1870 in execution of the said decree, and further to recover damages, &c.

In the plaint, it is alleged that the property in question was the ancestral property of the plaintiff and his brother, and had been in their family from generation to generation: that on the 14th December 1867, the father (defendant second party) without legal necessity and without the permission of his sons (the plaintiffs) by bond mortgaged the property to the defendants first party: that the defendants first party preferred a suit on the basis of this bond, obtained an *ex-parte* decree, and in execution thereof notwithstanding objections made by the plaintiff caused an auction sale of the property to be held, at which they bought the property themselves, and thereupon entered into the possession and enjoyment of it.

The plaintiff goes on to assert that, according to the Hindoo shaster of the Mithila school, both father and son have equal right in ancestral property: that the father defendant, second party, had no right, without any legal necessity recognized by the shasters and without the consent of the plaintiffs, his co-sharers, to mortgage the joint property, the subject of the plaint, on account of his personal debts: that the plaintiffs were not even benefitted by the loan taken by the defendant second party, and that consequently the auction sale held on the basis of the bond and of the invalid decree ought to be set aside.

In the written statement of the defendants first party, amongst other things, it is stated

that the loan which the bond secured was taken by the defendant second party to pay the zur-i-peshgee of a ticca lease which was obtained by him on favorable terms from one Mussamut Bondhoo Sooklain for the joint benefit of himself and his sons, and that profits were derived from this lease and applied to the joint benefit of the plaintiffs and himself: and it is maintained that, under these circumstances, the bond was binding on the plaintiffs.

It is also in the written statement of the defendants first party stated that the transaction of loan was carried on and concluded with the advice and consent of Mohabeer Pershad; and it was urged that he, therefore, could not in equity be allowed to object to it.

At the trial, the defendant second party did not appear, and it is evident that, in this suit, there is no real hostility between him and his sons.

We think that the evidence on the record leaves the facts of the case very clear. Ram Anoogra Singh and his two sons, Mohabeer Pershad and Sheo Nundun Pershad, have all along been and still are members of a joint Hindoo family living in commensality, and enjoying the family property according to the terms of the Mitakshara law. The property which is the subject of suit was in 1867 part of that family property, and was with the remainder of the family property under the management of the father as the head of the family and karta. In December of that year, still as head of the family, he took in his own name from one Mussamut Bondhoo Sooklain (a widow lady) a ticca lease of certain mouzabs which seem to have belonged to her for the estate of a Hindoo widow, and he appears to have taken them into possession and to have treated them as a part of the family property. To obtain this lease he was obliged to pay a premium or zur-i-peshgee of Rs. 10,000, of which sum he had only Rs. 7,000 in ready money. Accordingly he procured the remaining Rs. 3,000 by borrowing it of defendants first party on the mortgage to them, by the bond which is dated 14th December 1870, of the family property which forms the subject of suit. Mohabeer Pershad was admittedly at that time a major, and we are of opinion that he did, as the defendants first party allege, take an active part in carrying out and completing the mortgage transaction which is impeached by this suit, although no doubt his name does not appear on the bond. Several witnesses called by the

defendants first party, whose testimony the Judge believed, and whom we see no reason to discredit, swore positively to his being present when the bond was executed, and to his taking various steps at other times in furtherance of the negotiations for the loan. He does not himself come forward to deny on oath the statements which the defendants first party made affecting him in this respect in their written statement, and the only evidence upon which the plaintiff relies to rebut this part of defendants first party's case is the testimony of two witnesses, who endeavour in a very feeble manner to establish for him an *alibi* on the occasion of the bond being executed. The Mussamât lessor died a very few months after the lease was granted, namely, in April 1868, and the reversionary heirs of her husband (as they are designated) resumed the subject of the lease without paying back any portion of the Rs. 10,000 bonus. The evidence which is on the record does not enable us to form an opinion whether or not the joint family of the plaintiff derived any benefit from the leased property in the interval between the date of the lease and the date when the lessor died.

It is now by reason of the Full Bench decision, reported XII Weekly Reporter, 1, F. B., and other decisions to which we need not for the moment refer, placed beyond doubt that as long as a Hindoo family under the law of the Mitakshara is living in the joint enjoyment of the family property, without having come to an actual partition among themselves of that property, or an ascertainment and partition of their rights in it, so long no member of the family has any such separate proprietary right in the property as he can alien or encumber. The property under such circumstances belongs to all the members of the family jointly as to a corporation, and no one of the individual members has any share in it which he can deal with as property. Also under the same circumstances the property can only be aliened by the joint act of all the members, express or implied; or, in the event of such a case of family necessity occurring as will in the eye of the law serve to invest the karta with authority to alien as the agent of all, then by the karta alone.

It follows then that in the state of facts which we have mentioned as the facts of the present case, inasmuch as no sort of partition of the family property has even yet been effected by the members of the family, and no family necessity existed to justify the

taking of the loan by the defendant second party and the mortgage by him of the property, and one of the members of the family was at the time of the mortgage a minor, therefore the mortgage of 14th December 1867, together with the decree and sale which followed thereon, failed to convey to the defendants first party either the entirety of the property or any share or interest in it. Neither the father nor Mohabeer Pershad possessed any separate share or right in the property with which they could individually deal; and as Sheo Nundun was a minor, all the members could not join to convey the entirety; and as there did not exist any family necessity to justify the mortgage or sale, the karta alone could not alien.

Thus it seems pretty clear that the minor son at any rate, or rather a next friend on his behalf, is entitled to ask the Court to declare that the mortgage, the decree, and the sale were void of effect, and on that declaration to recover the property for the family.

If it had appeared that any profits had been in fact derived by the joint family from the property taken on lease, then it would have been a question whether or not the decree for possession ought not to be made conditional on the refund of the mortgage money, notwithstanding that the mortgage transaction strictly speaking gave the defendants first party no legal title to the property. This, however, as we have already said, has not been established, and therefore the only question remaining is whether or not for any other reason a condition should be imposed upon the recovery of the property. For the moment, then, let us reflect upon the consequence of allowing the property to be recovered by the minor unconditionally. The property is still family property; and it is recovered at the instance of the minor solely, because the father who affected to mortgage it, and the eldest son, who acted with him and aided him in the transaction, could neither singly nor together pass any title to the entirety, or to any share in it. Consequently, the property, on going back, will come to be enjoyed by the joint family as it was before the mortgage and sale; and of necessity, by virtue of the provisions of the Mitakshara law, will return to the management of the very man, defendant second party, who obtained Rs. 3,000 from defendants first party on the pretended security afforded by the mortgage of it. This does

not seem to accord very well with equity or good conscience.

Now it is to be observed that the Full Bench in the case which is reported in XII Weekly Reporter, while it answered in the affirmative the question put to it,—whether or not Bhugwan Lall, nephew, was entitled to recover the joint family property for which he sued, namely, that which Bhugwan Lall had pretended to mortgage,—at the same time guardedly refrained from saying whether or not he could do so without discharging the burden which Bhugwan Lall had affected to place upon it, on the ground that the facts were not sufficiently stated to enable it to do so. We are, therefore, in no degree fettered by that decision in regard to the mode in which we ought to answer this question, and we are, therefore, free to determine the conditions upon which in the present case the property ought to be recovered by the family, by a consideration of the apparent equities between the parties.

The first thing bearing on this point which is important to be kept in mind is that, although as long as no partition of the property has been come to, the whole family alone is capable of burdening the property or of aliening the entirety or any portion of it; yet a partition of the property among the members, amounting either to an ascertainment merely of the shares in which it is thereafter to be held or to an actual division by metes and bounds, may be come to by the family at any time; and moreover every member of the family may, whenever he chooses, require that it shall be come to. It appears then to be clear, if we return to the facts of the case which is before us, that the father, defendant second party, might if we were so minded, even on this very trial, say, I claim that the property on its coming back to the family shall thenceforward be enjoyed by the members in shares, and I ask that the amount of my share should be determined as between the members in order that I may now at any rate, though I could not before do so, effectually hypothecate that share to defendants first party as security for the money which I have taken from them. There is no doubt that he could do this the very moment when the property should come back after decree, and therefore nothing but considerations of expediency can intervene to prevent his doing so at the hearing of the case itself. And plainly the defendants first party are in equity entitled as against the father to insist upon his calling his share into being and realizing it for their benefit. He obtained

their money by representing that he had a power to charge the joint family property, which he knew at the time he did not possess; he is therefore at least bound to make good to them that representative so far as he can by the exercise of such proprietary right over the same property as he individually possesses. Substantially the same reasoning applies to the case of the eldest son Mohabeer Pershad, who aided his father in effecting the mortgage.

On the whole, then, we are of opinion that a decree ought to be given to the plaintiff to the effect that the property be recovered by the plaintiffs for the joint family, but that this decree must be accompanied by a declaration that on recovery the property be held and enjoyed by the family in defined shares, namely, one-third belonging to the father defendant second party, and one-third belonging to the eldest son Mohabeer Pershad, and one-third belonging to the second son Sheo Nundun Pershad, a minor, and that it be also declared that the shares of the father and of the eldest son be jointly and severally subject to the lien thereon of the defendants first party for the repayment of the sum of Rs. 3,000 advanced by the defendants first party to the defendant second party, and interest thereon at 6 per cent. from the date of the loan until repayment.

If there are not materials on the record in the present state of the case for determining these shares, the case must be remanded to the Lower Court for the enquiry what are the respective shares into which the father defendant second party and his sons are entitled to have the property divided.

We assume that the father and the two sons are all the independent members of the joint family, because the plaintiff was bound to make them all parties to the suit. If, however, there are others who are interested in the partition, their names must be put on the record as parties defendant before the extent of the father's and of Mohabeer Pershad's shares are determined.

The Court delivered the following judgment on the 20th June:—

Phear, J.—After the consideration which I have been able to give to the authorities which were cited on both sides during the second argument in this case, I have arrived at the opinion that the widow is upon the division which has been directed to be made, entitled to her share, either by way of maintenance or as a portion of the inheritance: it is not

for us at present to determine which. It seems to me that Section 2, Chapter I of the Mitakshara was intended to convey the direction which should govern the partition of the property by the father in his lifetime, to the effect that to the sons he may, if he chose, give unequal shares in his self-acquired property, but he must give them equal shares in his ancestral property. And as to his wives, he must in both sorts of property give them equal shares unless any one of them has previously had separate property given to her, in which event she will take a half share only. In both cases alike, it appears to me to be implied, if not expressed, that the wives are necessarily sharers. It would be strange if they were not entitled to a share in ancestral property, because if we look to the analogy of the Bengal law, we find there that upon a division of the property amongst the sons after the death of the father, while the mother is alive, the mother is certainly entitled to a share. And the Bengal law, we know, is not in so developed a state as the Mitakshara law in regard to the interests of the dependent members of the joint family: it rather tends to cut them down. I think, in this instance, I am fortified by the example of the Bengal law in the view which I have taken, that the wives are entitled under the circumstances of this case to a share in the ancestral property.

The defendant says that there is one wife alive. The result will be, we must say, that the father and the elder son's share is one moiety, and the mother and the other son's share is another moiety of the ancestral property.

If there is self-acquired property forming part of the property which was the subject of alienation, then that will remain the undivided separate property of the father subject to his alienation. There was an issue raised upon this point in the Court below, but it was not tried. And consequently, unless the parties come to some agreement upon it, the case must go back for the trial of that issue to the Lower Court, and the evidence which may be adduced thereon must be brought up with the record to this Court.

Ainslie, J.—I have not had an opportunity of considering this point quite so fully as I should have wished to have done. I am not prepared to dissent from the judgment which has been given by my learned brother.

The 18th June 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Hindoo Widow—Maintenance—Liability of Heirs.

Case No. 1246 of 1872.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 22nd May 1872, reversing a decision of the Subordinate Judge of that district, dated the 17th August 1871.

Tarunginee Dasse (Plaintiff) *Appellant,*

versus

Chowdhry Dwarkanath Mussant (one of the Defendants) *Respondent.*

Baboos Bhyrub Chunder Banerjee and Umbika Churn Bose for Appellant.

Baboo Doorga Mohun Doss for Respondent.

Where a decree for maintenance is passed in favor of a childless Hindoo widow against the assets of her husband, the party in possession of those assets is liable to pay that maintenance.

Markby, J.—THE suit in this case was brought by the appellant, who is a childless widow, against Chowdhry Dwarkanath Mussant, and certain other persons were also made defendants, but as regards them there is no question now before us. The plaintiff obtained a decree in the first Court for somewhat less than she asked for. That decree has been reversed by the District Judge, and the case now comes up here in special appeal.

It is admitted on both sides that in this family a childless widow does not succeed to the estate of her husband, but that she is entitled to maintenance out of it. The defendant, however, raised (amongst others which are not now material) an objection that the plaintiff's claim for maintenance at the rate of Rs. 300 was excessive; and he also said that the plaintiff had lost her right of maintenance by reason of her having left her husband's house and gone to that of her father.

The first Court thought that she did not lose her right of maintenance by reason of her having left her husband's house, and it being in evidence that two other widows of this family had received maintenance at the rate of Rs. 150 each, and another at the rate of Rs. 250, the Subordinate Judge considered that the plaintiff was at least entitled to maintenance at the lower rate, and he gave a decree at that rate accordingly. Then upon the question as to who was liable to pay that maintenance, he decided that at any rate the plaintiff was entitled to claim it out of the assets of her husband, and he gave a decree in that form directing that she should recover the maintenance due out of the assets of her deceased husband.

The grounds upon which that decree appears to have been reversed are that it is not shown by the appellant before us that her husband left any property, or that it is in the hands of the defendant. Now it seems to us that there was really no dispute in the Lower Court that some property was left by the plaintiff's husband; no issue was raised on that point; in fact, the defendant does not deny it; and there is evidence on the record that the other widows of this family had received considerable allowances by way of maintenance. It was under these circumstances for the defendant to have come forward and to have shown what that property was. Then as to the other point upon which the District Judge has reversed the decree of the Subordinate Judge, it is certainly true that there is no direct evidence on the record to show that the property of the family is in the hands of the defendant. But we need not consider whether or no there is anything in the circumstances of the case upon which it may be presumed that he is in possession of the family property because, as has already been pointed out, the decree given by the first Court for maintenance is not personally against the defendant, but only against the assets of the plaintiff's husband; and so far as the defendant is in possession of those assets, he is undoubtedly liable upon this decree to pay that maintenance. We think, therefore, that as regards the question of maintenance, the decision of the District Judge must be set aside and that of the Subordinate Judge restored.

As to the question of ornaments, which is quite a different part of the case, and which is a personal claim against the defendant, the Lower Appellate Court thought fit to reverse the decision of the Subordinate Judge, notwithstanding the refusal of the defendant

to appear when summoned, and we do not think that we should be justified in reversing that part of the Judge's judgment in special appeal. Therefore that part of the appeal will stand dismissed.

The appellant is entitled to get the costs of the appeal to this Court, and proportional costs in the Court below.

The 20th June 1873.

Present :

The Hon'ble Louis S. Jackson and
W. Ainslie, Judges.

Special Appeal — Illegal Inference — Onus Probandi — Joint Hindoo Family — Separate Acquisition — Succession — Union — Consanguinity.

Case No. 1607 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 13th May 1870, modifying a decision of the Subordinate Judge of Chumparun, dated the 6th July 1869.

Sham Narain and others (some of the
Defendants) Appellants,

versus

The Court of Wards, on behalf of Jung Bahadoor, minor (Plaintiff), and another (Defendant) Respondents.

Baboos Chunder Madhub Ghose and
Ramesh Chunder Mitter for Appellants.

Mr. R. T. Allan and Baboo Unnoda
Pershad Banerjee for Respondents.

In order to support a contention that the judgment of the Lower Appellate Court is erroneous in law because the Judge has failed to give proper effect to the documentary evidence adduced, it is necessary for the special appellant to show not only that the evidence is calculated to support certain conclusions, but that these conclusions alone flowed from it.

Where two parties equally circumstanced as regards want of title contend for the possession of certain property of which the defendant alone is in possession, the plaintiff cannot obtain a decree when he has no right, simply because the defence set up is ill-advised and weak.

Two Hindoo brothers who hold the ancestral estate in common with a third brother, may, nevertheless, hold self-acquired property in common between themselves in such a manner as to give a right of survivorship to one of themselves.

Leaving out of the question the survivor's right to succeed, and looking at the half share of the deceased brother as having been held separately on his own

account, his heir in respect of that property would be his widow, and during her life-time the third brother could have no right of succession.

Ainslie, J.—BEHARI Lall, Binda Lall, and Doonda Lall were uterine brothers. Binda Lall died, leaving a widow Ram Dootaree; then Doonda Lall died, leaving two sons, Sreedhur Narain and Jung Bahadoor; lastly, Behari Lall died, leaving five sons, Sham Narain and others.

This suit is instituted on the part of Jung Bahadoor, represented by the Court of Wards, to recover from Sham Narain and his brothers a four-anna share of certain villages granted under two deeds by the Rajah of Ramnuggur as compensation for services rendered to him, on the allegation that the three brothers, Behari, Binda, and Doonda were joint in estate, and that the grants were made in favor of all three jointly; that on the death of Binda without issue, his share was taken in equal portions by Behari and Doonda, who thus became entitled each to an eight-anna share in the said villages; and that the plaintiff is entitled to succeed to one-half of his father's share, or four annas.

The defendants alleged that the first grant was made to Behari Lall and Binda Lall, and the second to Sham Narain alone; and that Doonda Lall never had any interest in the properties which form the subject of this suit, but that the grants were in reality to Behari Lall alone.

The first Court found that the villages were the joint property of the three brothers and decreed to the plaintiff the four annas share claimed by him. The Judge on appeal found that the first grant of Mouzah Nowturwah, &c., was made to Behari Lall and Binda Lall to the exclusion of Doonda Lall, and that as the acquisition was in no way aided by the expenditure of any funds of the joint family, these villages are the self-acquired property of the two brothers; and that the second grant of Mouzah Lipnee was made to Sham Narain to his own use. He accordingly dismissed the claim to a share in Mouzah Lipnee, and reduced the share of Mouzah Nowturwah to be awarded to the plaintiff from four to two annas, holding that Binda Lall's share in this village was eight annas, of which one-half passed to his brother Doonda and the other half to Behari, and that the former half came by descent in equal shares to plaintiff and his brother Sreedhur Narain.

Against this decision the defendants have come up in special appeal, and the objection taken by them is that, on the finding that

Nowturwah was the separate self-acquired property of Behari and Binda, the Judge should have held that Doonda could not take any interest therein by inheritance from Binda.

The plaintiff has filed an objection under Section 348 to the finding that the properties in suit were not joint property of the three brothers.

We will first dispose of this objection.

Mr. Allan contended that the defendants were bound to prove not only that the properties now in suit were self-acquired, but further that they were held entirely separate, and that the profits derived from them never came into the common fund, and cited the case of *Gooroo Chaud Doss v. Goluck Moni Dossee*, decided by Sir Lawrence Peel, in support of the proposition that where self-acquired property is held so as to mix up the profits thereof with the profits of ancestral estate, the whole is to be deemed to form a common stock, and that unity of fund being established all increments of whatsoever description belong to the common fund.

But in this case the Judge has distinctly found that there was no blending of the self-acquired and ancestral properties, but that Doonda Lall never had any enjoyment of or benefit from the profits in suit. To get over this, it is contended that the judgment of the Court below is erroneous in law because the Judge has failed to give proper effect to the documentary evidence adduced by the plaintiff, and that the conclusions at which he has arrived are such as cannot be legally sustained. In order to support this contention of the special respondent, it is necessary for him to show not only that the evidence on which he relies is calculated to support certain conclusions, but that these conclusions, and these only, flow from it, and consequently that, when the Judge failed to draw them, his judgment as a whole must be taken to have been warped by this error.

There are three pieces of evidence relied on by the special respondent:—

1st.—A plaint filed by Behari Lall and Doonda Lall in a suit against the auction-purchaser of the rights and interests of Behari Lall in a village called Atanuggur to recover from him the shares of Binda Lall and Doonda Lall, the auction-purchaser alleging that the entire village was the self-acquired property of Behari Lall, and the plaintiffs asserting that it was joint family property. In this plaint, Behari Lall is described as

heir of a half of the share of Binda, and Doonda Lall as heir of the other half.

2nd.—A decree in a suit by Ram Doolaree, the widow of Binda Lall, to recover a one-third share of the whole of the family property, including the villages now sued for, on the allegation that Binda was separate in estate. This suit was dismissed on a finding that the family was an undivided Hindoo family; and

3rd.—An application under Act XXVII of 1860, dated 17th May 1867, made by Behari Lall and Doonda Lall, in respect of the estate of Binda Lall, in which they declare that they were united brethren of the deceased and the only persons entitled to a certificate, and that his widow had no right to one, and that all the family property was held in common.

As to the first, the Judge observes that it contains no special mention of Nowturwah, but seems to refer to ancestral properties and those acquired by purchase from the joint family funds; that in respect of the special property which formed the subject of that suit, the statements contained in it were found at the trial to be false, and that it was a mere attempt to defraud the auction-purchaser.

In respect to the second, he remarks that whatever may have been said by Sreedhur Narain in his written statement is no evidence against Sham Narain, and that "Sham Narain certainly objected all along to the property, granted by the Rajah to individual members of the family, being considered as a portion of the joint family property. See his petition applying for review, dated 28th March 1868, presented to this Court raising objections on this point to certain objections in my judgment. I then stated that this particular point had not been decided."

Mr. Allan contends that this application for review was an after-thought, and that the abstract of Sham Narain's written statement in the judgment shows that the point was not originally taken by him in his defence. If the special respondents wished to conclude the appellant by his own words, he ought to have put the original written statement before the Court, and not to have relied on an abstract of it. Not having this statement before us, we certainly cannot say that the Judge has mis-stated the facts when he says that Sham Narain objected all along. Nor can we deduce from his reference to the

application for review of judgment that the point then taken was one raised for the first time.

The decree against the widow was not conclusive of the rights of the defendant brothers *inter se*.

Then as to the third document, we think it only goes to show that the brothers combined to exclude the widow, who was putting forward a claim to a one-third share of the entire estate, and that though it doubtless may be used as evidence against the defendant to be considered with the other evidence in the suit, it is not *per se* conclusive and does not exclude the evidence offered on the other side.

Mr. Allan has referred to the rule laid down in *Pickard v. Sears*. "The rule of law is clear that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." But we fail to see how this rule applies to Behari Lall or his representatives. There was nothing in Behari Lall's plaint or petition, to both of which Doonda was a party, to induce the latter to believe any thing that he would not otherwise have believed and thereon to alter his previous position so as to conclude the Judge from holding, as he has done, that the statements in those documents are not binding. Whatever was done was evidently done by Behari and Doonda in concert to defeat others, and neither in any way deceived the other or induced any change of his position.

Taking these documents to be evidence to be weighed by the Judge with the other evidence in the case, we are not at liberty in special appeal to question his conclusions. The special respondents' objections must be overruled.

The special appellant contends that Doonda Lall could not inherit any portion of the self-acquired property of his brother Binda Lall, and that this property being jointly held by the two brothers, Behari and Binda, passes to Behari, or that at any rate the share of Binda would go to his widow Ram Doolaree, and that in no case could Doonda be the heir to any portion of it.

The judgment of their Lordships of the Judicial Committee in the Shivagunga case,

reported in IX Moore's Indian Appeals,* clearly establishes that ancestral and separately acquired estate do not follow the same course of succession, and that there need not be unity of heirship. Consequently, if we leave out of the question the right of Behari to succeed to any part of the separately acquired property, Mouzah Nowturwah, and look at the halfshare of Binda as held separately on his own account, his heir in respect of that property would be his widow; and during the life time of the widow, Doonda or his heirs can have no right of succession. On this ground then, the plaintiff's suit would have to be dismissed.

But it is said that neither in the Courts below nor in their grounds of special appeal have the defendants relied upon the superior title of the widow, and that they must stand or fall by their pleadings; and that unless they can make out the right of survivorship of Behari, the plaintiff is entitled to a decree. We do not assent to this. Assuming that Behari had no right of survivorship, we find two parties contending for the possession of certain property, both being equally circumstanced as regards title, or rather want of title, but with this material difference in their positions that the defendant is in possession and the plaintiff out of possession. It has been laid down "as a sound and uncontroverted maxim of law that every plaintiff or demandant in a Court of Justice must recover upon the strength of his own title, and not because of the weakness of that of his adversary: that is, he shall not recover without showing a *right*, although the adverse party may be unable to show any. It is enough for the latter that he is in possession of the thing demanded until the right owner calls for it." Now supposing this to have been an undefended suit, and that it had come to the notice of the Court that the plaintiff had no right, would the Court be justified in giving him a decree? Clearly not. Why then is the plaintiff to be put in a better position because the defendant, instead of meeting the plaintiff's claim by a simple assertion of his own possession and a challenge of plaintiff's right, chooses to attempt to set up a right for himself? However ill-advised and weak his defence may be, the Court will not allow plaintiff to recover when it is patent on the proceedings that he has no right. We think that, if at any stage of a trial it becomes

apparent that a plaintiff has no right to the relief he seeks, the Court is bound to dismiss his suit without reference to the case set up by the defendant.

The fact that the widow has instituted a suit for the property of her husband and failed, is not material. On the findings of fact of the Court below in this suit, it would appear that she was trying to get much more than what she was entitled to, and in the attempt she risked and lost what she might have recovered, had she not clouded her title thereto by mixing it up with the larger claim; but her failure to enforce her own rights does not create any right for Behari or Doonda beyond the right of possession, and that is a right from which plaintiff can derive no advantage as the possession is not with him.

The appellants have set up a right of survivorship in Behari in respect of the property acquired by gift from the Rajah by Binda and himself and held jointly by them to the exclusion of Doonda.

Baboo Unnoda Pershad Banerjee for the respondent contended that although in Bengal a separated brother does not inherit with united brothers the share of a deceased united brother, yet under the Mitakshara the rule is otherwise. In support of this, he referred to the 5th verse of Section IV, Chapter II—"To the nearest sapinda the inheritance next belongs;" and urged that this rule applies in all cases unless superseded by some special exception, and that the only exception to be found in the law is in the case of the brother re-united after separation provided for in Section IX of the same Chapter. He also pointed to verse 8 of Section IV—"In case of competition between brothers and nephews, the nephews have no title to succession, for their right of inheritance is declared to be on failure of brothers"—as showing that the rule contained in verse 4 (subject to the particular qualification mentioned) is absolute, and that the law does not contemplate any diversity in the course of succession; but he did not attempt to show on what principle the difference (if it really exists) between the general course of succession of brothers and that provided for the case of re-united brothers is founded.

It is admitted that the text of the Mitakshara is not exhaustive, and that the principle and not the letter is to be followed; and if we find a principle of union as a source of inheritance running through the whole of

* 2 W. R., P. C., 31.

Section IX, which discusses the rights of re-united brethren, side by side with the principle of consanguinity, which alone is mentioned in Section IV, we may reasonably infer that there is some special reason for the omission of the former principle in this latter Section; and that reason appears to be that in this Section the author was discussing the rights of brethren who, save in the particulars noted, were all equally circumstanced, that is all united, or all dissociated. A similar view was taken by their Lordships of the Privy Council, *vide* IX Moore, page 607: * "Indeed, the whole chapter" (the second) "in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of a deceased husband."

We cannot suppose that the author of the *Mitakshara* looked upon family union with such favor that he held out special inducements to re-union after separation, while at the same time he gave no preference to the brothers who had never separated over the brothers who had dissociated themselves. The apparent difference seems to be reconciled by supposing him to treat every division of a family as a complete separation of all its members and the continuance in union of some after division, and the separation of others, as a re-union: in this view union and re-union, so far as concerns succession, are synonymous terms, and there is no inconsistency in the treatment of unseparated and re-united brothers.

It has been said above that the principles of union and relationship run side by side through the whole of Section IX. If we examine that Section, we find these rules:—

I. A whole brother re-united excludes a whole brother dis-united,—*i.e.*, relationship being equal, the succession is regulated by union.

II. A whole brother re-united excludes a half brother re-united,—*i.e.*, union being equal, superior relationship rules the succession.

III. A whole brother dis-united and a half brother re-united share equally,—*i.e.*, superior relationship without union, and union with inferior relationship are equal; and this is distinctly stated in the annotation from *Balambhatta* on the 11th verse on the words "the reasons of both rights may subsist at the same time," which is, "re-union of the

half brother in family partnership and the whole brother's relation by blood."

It is evident that the material circumstances are family partnership and relation by blood. If any special effect were intended to be given to re-union as against unbroken union, one would have expected very clear rules on the subject. In the absence of any notice of it, it would be a servile following of the letter in opposition of the spirit of the law to draw the distinction which is insisted on by the respondent.

Turning again to the *Shivagunga* case, at page 610,* we find these words:—

"Again there are two principles on which the rule of succession according to the Hindoo law appears to depend: the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is the assumed right of survivorship."

We think, therefore, that the rule of succession propounded by the respondents' pleader cannot be maintained, and that if it can be established that the property in suit is to be considered the joint family property of Behari and Binda, the inheritance devolved on Behari, and not on either Doonda or Binda's widow. Here the question arises whether there can be, so to speak, a united family within a united family; whether Behari and Binda who held the ancestral estate in common with Doonda, held the acquired estate in common between themselves in such a manner as to give a right of survivorship to the former.

The Judge has found that these two brothers did hold in common to the exclusion of Doonda, but it is urged that this was an ordinary partnership such as might have subsisted between a Hindoo and a Mahomedan, if the two grantees had been respectively of these persuasions. But if we find that the property was susceptible of being held as the common property of a united family, we think that the relationship of the parties should not be overlooked.

It is admitted that Behari and Binda could each hold a half of *Mouzah Nowtarwah* as separate property, although both were members of an undivided family. It cannot be denied that had the ancestral property been divided, Behari and Binda could have united and brought their separate property into a common fund together with their

* 2 W. R., P. C., p. 38.

* Page 39 of Vol. II, Weekly Reporter.

shares of ancestral property, and have made it subject to the rules of succession of joint family property. Again, supposing that there had been no ancestral estate, and the three brothers had separated, and afterwards Behari and Binda had acquired property and coalesced, it is indubitable that they might have established complete community of interest in the acquired property. If then it was open to them to deal with the separately acquired property in such a way as to make it subject to the rules applicable to joint family property, provided there had been a formal separation in the family, it does not appear on what principle we are to refuse to recognize their power of combining in the use and ownership of this property because there had been no formal separation.

We, therefore, come to the conclusion that the position for which the appellants contend, namely, that Behari and Binda did hold Mouzah Nowturwah as their common property as united Hindoo brothers, is one which is not repugnant to law, and on the finding of the Court below on the facts it must be taken as actually subsisting.

We, therefore, overrule the objection taken by the respondent, and decree the appeal, dismissing the suit of the plaintiff with all costs in all the Courts.

The 21st June 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

Act VIII of 1859 s. 246—Jurisdiction—High Court's Powers—S. 15 Charter Act.

In the matter of
Hureehur Mookerjee, *Petitioner,*

versus

Nobin Chunder Doss, *Opposite Party.*

Baboo Gopal Lall Mitter for Petitioner.

Baboos Rajendro Nath Bose and Debendro Narain Bose for Opposite Party.

Where a claim is lodged to attached property on the ground of purchase before attachment, and the decree-holder alleges that the claimant is a benameedar for the judgment-debtor, the Court is bound under Act VIII of 1859 s. 246 to enquire whether the property is or is not in

the possession of the party against whom execution is sought or of some other person in trust for him.

In a case where the Subordinate Judge did not consider himself competent to make such inquiry, the High Court declined to interfere under the special provisions of the Charter Act because the decree-holder had a remedy by regular suit.

Kemp, J.—THIS is an application on behalf of Hureehur Mookerjee, a decree-holder. He obtained a decree against Soobid Narain. Upon this, one Nobin Chunder Doss, alleging that he purchased the properties attached from the judgment-debtor before the attachment, lodged a claim. The Subordinate Judge was of opinion that the evidence as to the possession of the claimant was not very satisfactory, and that it also appeared to him that there was reason to believe that the alleged sale was in fraud of creditors; but as he thought that he was not competent under Section 246 to enter into that part of the enquiry, and finding that there was some evidence of the possession of the claimant, he allowed the claim and referred the petitioner to a regular suit. Upon this, the petitioner, the decree-holder, applied to this Court and obtained a rule on the opposite party to show cause why the order of the Judge should not be set aside, and the Judge directed to proceed under Section 246.

We think it is clear that the Subordinate Judge ought to have enquired into the question as to whether the properties which the claimant alleged he had purchased were purchased by him benamee for the judgment-debtor or not; for the Section in question, namely, Section 246, directs that the Court shall enquire whether the property attached is or is not in the possession of the party against whom execution is sought or of some other person in trust for him. Now, it was clearly alleged by the decree-holder that Nobin Chunder Doss, the claimant, was a mere benamee for the judgment-debtor Soobid Narain, and therefore it was not only competent but incumbent upon the Subordinate Judge to enquire into that question under Section 246; but we think in this case that it would not be advisable to direct the Subordinate Judge to do so and make this rule absolute inasmuch as the complainant has a remedy by regular suit, and it is only in cases where there is no remedy that this Court ought to interfere under the special provisions of the charter. We therefore discharge this rule, but under the circumstances of the case we think it ought to be discharged without costs.

The 23rd June 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Enhancement of Rent—Inconsistency of Notice.

Case No. 114 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 8th April 1872, affirming a decision of the Moonsiff of Auliah, dated the 1st December 1871.

Ram Ruttun Ghose (Defendant) *Appellant,*

versus

Prosuuno Nath Bhattacharjee (Plaintiff)
Respondent.

Baboo Nullit Chunder Sen for Appellant.

Baboos Doorga Mohun Doss and Kissen Dyal Roy for Respondent.

In a suit for enhanced rent where the notice had stated all the grounds required to be stated, and the ryot had not in any way been prejudiced, the Court refused to admit in special appeal an objection which had not been urged previously, to the effect that the grounds in the notice were inconsistent with those stated in the plaint.

Kemp, J.—We think this special appeal must be dismissed with costs. The suit was for arrears of rent at an enhanced rate after service of notice. The plaintiff took every ground of enhancement which the law allowed him. He failed to prove that the productive powers of the soil had been increased in any way, or that the defendant was holding an area in excess of that recorded in the measurement; but he succeeded on the last ground, namely, that the defendant was paying at a lower rate than that paid by ryots of a similar class holding lands of a similar description in adjacent places, and a decree was passed at the rate of 1 rupee 8 annas per pakhee.

In appeal it is contended that the grounds of enhancement disclosed in the notice and in the plaint are inconsistent with each other, and therefore illegal and insufficient grounds, and that the plaintiff's suit ought to be dismissed. Second, that the depositions of the plaintiff's witnesses relied upon by the Courts below do not afford legal evidence that the defendant paid at a lower rate than that paid by similar ryots for a similar class of lands with similar advantages.

With reference to the first objection, a decision has been quoted in Volume VII, Weekly Reporter, page 284. No doubt the grounds of enhancement are inconsistent, but in this case it is clear that the ryot has not been in any way prejudiced by the plaintiff stating all the grounds of enhancement under the Section, inasmuch as he has answered all those grounds and has taken no objections below as to any inconsistency in the notice. There is also a case in Volume XVIII, Weekly Reporter, in which this view is taken.

Then with reference to the second objection, we have had the evidence read to us. It is the evidence of persons cultivating lands of the same quality as that cultivated by the defendant in the neighbourhood, and they depose that 1 rupee 8 annas is the proper rate. True they do not say in their evidence that they are ryots of the same class as the defendant, but it appears from the decision of the Subordinate Judge that it was not contended in the Court below that they were not ryots of the same class as the defendants.

On the whole case, therefore, we think the special appeal must be dismissed with costs.

The 23rd June 1873.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Witnesses—Examination.

Case No. 172 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 11th November 1872, reversing a decision of the Moonsiff of Salkhea, dated the 21st February 1872.

Hurish Chunder Ghose (Plaintiff) *Appellant,*

versus

Gopal Chunder Ghose and others
(Defendants) *Respondents.*

Baboo Bhowantee Churn Dutt for Appellant.

Baboo Kumla Kant Sen for Respondents.

Where the first Court declared itself to be satisfied with the evidence of one witness and did not think it necessary to examine further witnesses whom the plaintiff adduced, it was held that if the Lower Appellate Court was not satisfied with the evidence of that one witness, it should have given plaintiff an opportunity of examining the other witnesses.

Jackson, J.—THE decision of the Lower Appellate Court in this case cannot stand. It reversed the judgment of the Moonsiff

mainly upon the ground that the deed of conditional sale filed by the plaintiff was not satisfactorily proved. Now the Moonsiff stated in his judgment "the plaintiff's kotalah has strongly been proved by the sworn testimony of Gopal Chunder Ghose. The plaintiff had other witnesses ready to prove the execution of the mortgage deed, but I was satisfied with the evidence of Gopal alone and therefore dismissed the other witnesses of the plaintiff." If the Moonsiff, declaring himself to be satisfied with the evidence of any one witness, does not think it necessary to examine any further witnesses whom the plaintiff may have adduced, and the Lower Appellate Court on appeal is not satisfied with the evidence of that witness, it is extremely unfair to the plaintiff to dismiss his whole suit. He must be given an opportunity of examining the other witnesses whom he may think fit to examine. The case must accordingly go back to the Lower Appellate Court for retrial. If in the opinion of the Judge of the Lower Appellate Court any further evidence is necessary, he should allow it.

I am reminded by my learned brother that before any judgment can be given in favor of the defendant, it is necessary to see that the *bonâ fide* execution of the kotalah upon which she relies is made out.

The 23rd June 1873.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Act VIII of 1859 s. 223—Lis Pendens.

Case No. 717 of 1872.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 30th January 1872, reversing a decision of the Moonsiff of Serampore, dated the 17th April 1871.

Chunder Koomar Lahoree (Plaintiff)
Appellant,

versus

Gopee Kristo Gossamee (Defendant)
Respondent.

Baboos Hem Chunder Banerjee and Bama Churn Banerjee for Appellant.

Mr. J. T. Woodroffe and Baboos Obhoy Churn Bose and Mohendro Lall Mitter for Respondent.

Act VIII of 1859 s. 223 refers to decrees generally whenever they may be passed, and provides that, being

so passed, they are to be effectual from the time the suit was instituted, so far as parties claiming under a title made by the judgment debtor are concerned, even where such title was created before an appeal was filed from the order dismissing the suit, and when no decree existed:

Per Glover, J. (Mitter, J., dissentiente).—When a Court of competent jurisdiction has pronounced its judgment in a suit, that suit is for the time at an end. Where a suit is dismissed, and no petition of appeal is filed, the suit has no legal existence, and there is no suit pending.

Glover, J.—It appears to me that we need not go beyond the first ground of special appeal taken by Baboo Hem Chunder Banerjee, and that on that ground the appeal ought to be allowed with costs, and the Subordinate Judge's order reversed.

If Section 229 of the Civil Procedure Code has been rightly applied to this case, then no doubt the onus of proving title was on the plaintiff, and the concurrent findings of both Lower Courts that he had failed to prove it have disposed of his appeal so far. But it seems to me that Section 229 does not apply, but that Section 223 does. This latter Section says that if the property for which a decree has been made is found to be in the occupancy of a person claiming under a title created by the defendant subsequently to the institution of the suit possession shall be given to the decree-holder, and any person refusing to vacate shall be removed.

Now although the plaintiff lost his suit in the first Court, he undoubtedly had eventually a decree, that of the Judge, dated December 9th 1869, which was afterwards affirmed by the High Court, and there is nothing that I can see in Section 223 which limits the effect of such decree to a time when a claimant had no interest. There might have been no decree in existence when the defendant bought the property on the 19th of August 1869, the plaintiff having failed in the first Court; but the Section refers to decrees generally whenever they may be passed, and provides that being so passed they are to be effectual so far as parties claiming under a title made by the judgment debtor are concerned from the time the suit was instituted.

In other words, the decree obtained by the plaintiff in this case on the 9th of December 1869 was sufficient under Section 223 to avoid the incumbrance made by the defendant in that suit to the defendant in this in August of that year, the suit having been instituted in July.

It appears to me that, by the operation of this Section, the plaintiff ought to have been put in possession of the house, and the

defendant have been left to his remedy in a regular suit, in which suit the *onus probandi* would have been upon him.

Section 229 was not, I think, meant to apply to a case of this kind. The words "on his own account" may possibly be made to include a purchase from a defendant, but when we have a Section of the law (Section 223) which exactly meets the circumstances of a case that is the Section which must be applied, although there may be some other Section which would give a less degree of remedy.

It is not absolutely necessary for our decision to go further than this, but as the question of *lis pendens* was the subject of much argument before us, I think that we ought to give an opinion on that point also.

The plaintiff lost his case in the Court of first instance on the 18th August 1869. The defendant's kotalah of purchase is dated the 25th of August 1869, and the plaintiff did not appeal to the Judge till the 10th of September following, so that at the date of the defendant's purchase there was no appeal pending, and consequently according to Mr. Woodroffe's contention no *lis pendens*.

Baboo Hem Chunder, on the other hand, contends that a suit once instituted is not at an end until the period of final decree, and that so long as there is still an Appellate Court to which the case can be taken there is a continuous *lis pendens*.

The rule of law has been often enunciated, and a person buying a property during the pendency of a suit is bound by the decree that may be made against the person from whom he derives title. The question before us is, was the defendant's purchase on the 25th August 1869 made whilst there was a suit pending?

The appellant's pleader refers to Sections 135, 338, 354, and 376, as showing that a suit is to be considered as in existence until the period of appeal is passed, and to the case of *Kristo Kiukur Ghose vs. Burroda Kant Singh*, P. C., XVII Weekly Reporter, 292.

I do not understand these Sections as saying more than that under certain circumstances a decree which is *prima facie* a final determination of the suit can be sus-

pended whilst the original case is re-opened and re-tried by an Appellate Court. Chapter III of the Code, which treats of original suits, is headed "of a suit till final decree," thus seeming to point out that a suit is over when a decree is passed, and that any further proceedings take place in an appeal, and not in a suit, properly so called. When fresh issues are fixed by an Appellate Court under Section 354 and a fresh finding on them come to by the Court of first instance, that finding is part of the suit, but the completed record is still the "appeal," and is so determined. The final decree no doubt is the decree passed by the last Appellate Court, but so long as the decree of a Lower Court is unaltered, that is the substantial decree in the suit.

The case quoted from XVII Weekly Reporter does not touch the question. The decree of an Appellate Court may be the final decree in a suit, but the judgment does not say that the suit has not been legally decided until that decree.

It appears to me that when a Court of competent jurisdiction has pronounced its judgment in a suit, that suit is for the time at least at an end. It may revive on a petition of appeal being filed, but so long as nothing is done the decree is the decision of the suit. Now when the special respondent purchased the property in question, the plaintiff's suit (having been dismissed by the Moonsiff, and no petition of appeal having been filed) had no legal existence, and there was therefore no suit pending the ultimate decision of which on appeal would bind the purchaser from a party to the suit. If the purchase had been made after the 10th of September 1869, it would have been a different thing.

A good deal was made in the course of the argument of the conduct of the special respondent throughout this transaction, and it was said that his acts showed a fraudulent intention, he having notice throughout of the plaintiff's contracts to purchase. Now in the first place, the Subordinate Judge has found distinctly there was no fraud on the part of the defendant Gopee Kristo, and it is not easy to see how fraud could be deduced from the circumstances of the case against the defendant purchaser. He might have heard that the plaintiff was negotiating for the house, but there was nothing in that to prevent his negotiating likewise. It was

his vendor's business to keep faith with the plaintiff if he was already pledged to him, and the defendant's conduct in endeavouring by the expenditure of time and money to prevent the order of dismissal passed by the Moonsiff being set aside on appeal, he having in the meantime bought and taken possession of the house, was perfectly reasonable and allowable. It was argued that, by doing this, Gopee Kristo made himself a party to the appeal which was decided in favor of the plaintiff, but this cannot be. His name was not on the record, and the mere fact of his endeavouring to protect his own interests by supplying funds for resisting the appeal could not make him a party to it.

Mitter, J.—I concur with my learned colleague in decreeing this appeal. It seems to be quite clear that the defendant purchased the property in dispute with full knowledge of the pendency of the former litigation, and he is therefore bound by the result of it. It is true that the said purchase was made after the dismissal of the former suit by the Court of first instance, and before the date of the filing of the appeal. But that circumstance cannot take the case out of the operation of the principle of *lis pendens*. The time for preferring the appeal had not expired, and the defendant ought therefore to have waited for the final result of the suit. The above view seems to be fully supported by the case of *Craigdallie and others*, 1 Dow's Reports, page 3.

Considerable stress has been laid by the learned counsel for the defendant upon that portion of the judgment of the Lower Appellate Court in which that Court says that the defendant had obtained possession of the property in dispute under a contract for sale prior in date to that upon which the plaintiff brought the former suit. But this finding is based upon a total misconception of the evidence bearing upon the point. The defendant's own deposition on oath shows that he had no interest in the property previous to the execution of the bill of sale upon which he substantially rested his defence, and it seems to be quite clear that the plea of prior contract is without any valid foundation. There is nothing to show what the terms of that contract were, nor do I find anything to warrant the conclusion that the sale relied upon by the defendant was made in pursuance of any prior contract. The evidence of the defendant's agent, Mirtunjoy Chuckerbutty, clearly shows the utter hollowness of the plea.

The 24th June 1873.

Present:

The Hon'ble F. B. Kemp and J. B. Phear,
Judges.

Over-valuation of a Suit—Discretion of Appellate Court—Costs—Act VII of 1870 s. 12.

Case No. 1079 of 1872.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 5th April 1872, modifying a decision of the Subordinate Judge of that district, dated the 26th May 1871.

Muthooranath Mozoomdar and others
(Plaintiffs) *Appellants*,

versus

Mohobuttoonnissa Bibee and another
(Defendants) *Respondents*.

Baboos Mohinee Mohun Roy and Issur Chunder Chuckerbutty for Appellants.

Baboo Sreenath Doss for Respondents.

An appellant was held to have acted rightly in putting in his appeal upon the valuation of the plaintiff, as approved of by the first Court, although that valuation had been greatly over-estimated, and the Appellate Court was held to have been justified in awarding costs in proportion to what it considered the proper valuation.

There is nothing in s. 12 of the Court Fees Act which precludes a Judge from exercising his discretion in the matter of costs.

Kemp, J.—THIS appeal turns upon a question of costs alone. The suit by the plaintiff was to have his right declared to collect the rents jointly with the defendants from 730 beegahs of land forming a portion of an estate paying revenue to Government. The plaintiff distinctly alleges that his share is 4 annas 16 gds. 3c. 5k., and the valuation put on the suit, which was approved of by the first Court, was not ten times the sudder jumma, but the market-value of the land which is assumed to be worth 1 rupee 8 annas per beegah. Now if the plaintiff had been suing for the whole estate, which is an estate paying revenue to Government, it is clear that he would have had to value his suit at ten times the sudder jumma. The sudder jumma of this estate being Rs. 763-8; the proper valuation of a suit for the whole mehal would be Rs. 7,635, and the share which the plaintiff claims would represent the three-tenths of the whole mehal. Now it is clear that the valuation

which the plaintiff has put upon his suit, namely, Rs. 4,968, does not represent three-tenths of the sudder jumma for ten years or three-tenths of Rs. 7,635. On appeal, the defendant was obliged to value his appeal according to the valuation of the plaintiff which had been approved of by the first Court, but the Judge in dealing with the question of costs, and in the exercise of a proper discretion in the matter, found that the defendant ought not to be made liable for costs beyond the proper valuation of the suit, namely, ten times the sudder jumma in proportion to the share which the plaintiff claimed, and he has awarded costs on that principle.

We think there is nothing in Section 12 of the Court Fees Act which precludes the Judge from exercising his discretion in the matter of costs. That Section says that "every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal, shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit;" and Clause 2 of the same Section says that "whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided."

Now, in this case, there is no question as to the revenue having suffered, the valuation of the suit by the plaintiff being, as found by the Judge, greatly over-estimated. It is true that the defendant, special respondent, might have applied to the Judge under Section 12, in filing his memorandum of appeal, to decide the question and determine the amount of the fee chargeable on the appeal; but in putting in the appeal upon the valuation of the plaintiff as approved of by the first Court, we think that the defendant was acting rightly and that the Judge in the exercise of his discretion was justified in awarding costs in proportion to what he considered to be the proper valuation of the suit, namely, ten times the sudder jumma in proportion to the share of the mehal which the plaintiff claimed.

We dismiss the special appeal with costs.

The 26th June 1873.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

*Auction Purchaser—Suit for Enhanced Rent—
Notice.*

Case No. 1492 of 1872.

*Special Appeal from a decision passed by
the Judge of Dinagapore, dated the 5th
August 1872, modifying a decision of the
Moonsiff of Shibgunge, dated the 28th
March 1872.*

Enayetoollah Meah (Defendant) *Appellant,*

versus

Nubo Coomar Sircar (Plaintiff) *Respondent.*

*Baboos Rash Beharee Ghose and Rajendro
Nath Bose for Appellant.*

Baboo Doorga Mohun Dass for Respondent.

If the auction purchaser of a khas mehal seeks to make the tenant pay more rent than the latter has hitherto paid, he must issue a notice on him; he cannot sue him for enhanced rent upon a jumma bundee, to the terms of which the tenant has not consented.

Kemp, J.—THIS is a suit for arrears of rent of the years 1275, 1276, and 1277. The plaintiff appears to be the auction purchaser of a khas mehal of which the Government share was six annas. He says that the jumma of the defendant payable on the six annas share is Rs. 69-6-8, and that his not having paid that rent constitutes his cause of action. The defendant denied liability to pay at that rate, and stated that the plaintiff is entitled to receive only Rs. 26-1-9 on account of his six annas share, and that the balance is payable to the other shareholders; that, according to that jumma, the plaintiff is only entitled to Rs. 53-10 from Magh 1276 to the end of 1277, and that he is not bound by the jumma bundee made by the Collector in 1272 to which he was not a consenting party. The Moonsiff observes that the plaintiff was not entitled to claim rent under this jumma bundee, as there is no proof of the defendant's having agreed to pay the rent fixed by it and that the defendant was not bound by it, and that from an attested copy of the settlement roobakaree it appeared that this jumma bundee had not been sanctioned by the Collector. He therefore held that the plaintiff was only entitled to the rent admitted by the defendant, and gave a decree for Rs. 53-10 with proportionate costs. The

Judge on appeal seems to have held that the defendant was bound by the jumma-bundee, and he reversed the decision of the Moonsiff.

We think that the decision of the Moonsiff was the correct one, and that it must be restored. We have been shown the jumma-bundee of 1273. Now this jumma-bundee is an authenticated copy from the Collectorate records, and it shows that the amount payable by the defendant on his six annas share, as alleged by him, is correct, while the jumma-bundee upon which the plaintiff relies has not been sanctioned by the Collector and has otherwise been found fault with by the Moonsiff. Moreover it does not appear that the defendant consented to the terms of that jumma-bundee. Of course, if on re-assessment of the khas mehal the defendant had agreed to it, the suit of the plaintiff would have been a proper suit on the jumma-bundee, but, as already stated, the defendant did not agree to the terms of that jumma-bundee, and, if the plaintiff seeks to make him pay more rent than he has hitherto paid, he must issue a notice on the defendant: see decision reported in Vol. XVI Weekly Reporter, page 163.

We reverse the decision of the Judge, and restore that of the first Court with costs of both Courts payable by the plaintiff.

The 27th June 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Amendment of Defence—Procedure—Act VIII of 1859 ss. 141 & 354.

Case No. 1319 of 1872.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 8th June 1872, reversing a decision of the Moonsiff of Rughoonathpore, dated the 18th November 1871.

Bolye Menh (Plaintiff) *Appellant*,
versus

Khetoo Gorai and others (Defendants)
Respondents.

Baboo Rash Beharee Ghose for Appellant.

Baboo Hem Chunder Banerjee for
Respondents.

In a case in which, after the evidence of both parties had been taken, the principal defendant asked for

permission to file an amended written answer which would in effect raise a new question as part of the defence, *HELD* that, although the mode of making the application was perhaps somewhat informal, it was the duty of the Moonsiff, if it appeared that this was the real question between the parties, to amend the issues in order to its determination.

Where a Moonsiff rejected such application and decreed the case, and it appeared to the Judge on appeal that the evidence on the record was sufficient to determine the question, *HELD* that the Lower Appellate Court was right in giving effect to the defence.

Couch, C.J.—In this case, it appears from the judgment of the Moonsiff that, after the oral and documentary evidence of both the parties had been taken, and, as he describes it, the case was ready for hearing (meaning, we suppose, ready for him to consider what his judgment should be), the principal defendant asked for permission to file an amended written answer "to the effect that his vendor's shareholders had given consent for the settlement of the talook along with them." Although the application is said to be to file a written answer, in effect it was an application to the Moonsiff to raise this question as part of the defence to the suit, and to consider it as one of the questions in the case. The mode of making the application was perhaps somewhat informal, but he ought to have understood it as such. He says that the prayer was rejected, and he proceeded to determine the issue which he had laid down, and decided in favor of the plaintiff.

It was the duty of the Moonsiff, by the words of the Code of Civil Procedure, at that stage of the suit, if it appeared that the real question between the parties was whether the lease had been granted in such a way as to bind all the shareholders, to have amended the issues so as to determine it. Section 141 says that at any time before the decision of the case, the Court may amend the issues or frame additional issues, and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be so made. The Judicial Committee of the Privy Council has said in *VI Moore's Indian Appeals*, page 393,* that it is the duty of the Subordinate Courts to constantly bear in mind that they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; and that if, by inadvertence or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity

* *Huoomanpershad Panday's case.*

should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute.

The Moonsiff having rejected the application, the case came by appeal before the Judge, and the parties in the appeal complained of the conduct of the Moonsiff in this respect, and insisted that this question ought to have been determined. The plaintiff, therefore, had abundant notice that the defendants would treat this as one of the questions in the suit and one which ought to be determined, and if he supposed that the evidence which had already been given was not sufficient to enable the Appellate Court to determine it, it was open to him to submit that to the Court. He had, by the grounds of appeal, notice that the defendants would ask the Appellate Court to try the question. In this respect the case is peculiar and differs from any that has been quoted. Evidence on the point had been given, whether designedly or not does not appear, and there was evidence upon which the Appellate Court was able to determine the question. Section 354 says, that the Appellate Court, if it sees that the Lower Court has omitted to determine any question of fact which shall appear to the Appellate Court essential to the right determination of the suit upon the merits, and the evidence on the record is not sufficient to enable the Appellate Court to determine such question, it may frame an issue for the purpose of having it tried by the Lower Court. But the Appellate Court has power, if it thinks that the evidence on the record is sufficient, to determine the question itself. The Judge then had power to determine this question which appeared to him, and was in fact, one which was essential to the right determination of the suit.

He says in his judgment that the facts elicited on evidence and proved by the plaintiff's own witnesses, as well as those of the defendants, are that all the 36 *pro forma* defendants are members of a joint undivided Hindoo family. Residents of the villages in dispute and of other villages state that the rent having fallen in arrear, ten of them, who appear to have had the management of the family estates, in consideration of Rs. 1,500, gave defendant No. 1 the talook of the entire village of Oorma at a yearly rent of Rs. 302; that the defendant was put in possession and remained in possession without objection from any of the co-sharers till the institution of the present suit, about three years ago; and that, of the consideration

money, upwards of Rs. 900 were paid to the zemindar on account of the rent due by all the shareholders, and, as admitted by some of the plaintiff's witnesses, the remaining portion was divided amongst the others.

If there was such evidence in the case, the Judge was quite right in giving effect to the defence which was raised before the Moonsiff, before he had given his judgment, and which he ought to have considered.

The case appears to us to be distinguishable from the decision of Mr. Justice Markby and Mr. Justice Birch in XIX Weekly Reporter, page 348. In the opinion of the Judge, these defendants had a good answer to the claim of the plaintiff; and where that is the case, it would be improper for the plaintiff to have a decree in his favor, because they did not at first set up in their written statement the precise defence they had to the suit. Having done so before the decision of the case, effect ought to be given to it.

The appeal must be dismissed with costs.

The 27th June 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

*Accretions — Contribution — Liabilities of
Co-sharers.*

Cases Nos. 1482 and 1704 of 1872.

*Special Appeals from a decision passed by
the Officiating Judge of Mymensingh,
dated the 16th July 1872, modifying a
decision of the Subordinate Judge of that
district, dated the 28th November 1871.*

Obhoy Kant Lahoree and another
(Defendants) *Appellants,*

versus

Ram Soonduree Dabec Chowdhra (Plaintiff)
Respondent.

Baboo Nullit Chunder Sein for Appellants.

*Baboo Chunder Madhub Ghose for
Respondent.*

B, having obtained a decree against T and other zemindars of Pergunnah Mymensingh, for possession of certain accreted lands as pertaining to Pergunnah Jaffershye, took out execution and recovered costs, &c., from T alone, who sued his co-debtors for contribution.

no question being raised as to separate liabilities. T obtained a joint decree, took out execution, and recovered from R alone, who then brought a suit for contribution against the other co-debtors, obtaining a decree in both Courts. In special appeal it was contended *inter alia* that the principle of the decree was wrong, and that the defendants were liable only for that portion of the land of which they were in wrongful possession:

HELD that, as in the original suit, there was no plea that the lands were in the occupancy of the answering defendants in any other way than under their zemindary title, the only way in which the liabilities could be awarded was by making each party pay according to the shares they held in the parent zemindary.

Kemp, J.—THESE two appeals are from the same judgment, and it is admitted that one decision will govern both cases.

It appears that one Bhyrub Chunder Chowdhry in 1846 sued Tarinee Kant Lahoree, Huro Soonduree Dabee, Shama Kant Lahoree, Ram Soonduree Dabee and Soorjo Kant Lahoree, zemindars of Pergunnah Mymensingh, for possession of certain accreted lands as appertaining to Pergunnah Jaffershye. A decree was given in favor of Bhyrub Chunder Chowdhry, who took out execution, and recovered costs, &c., from Tarinee Kant Lahoree alone. In 1862, Tarinee Kant sued his co-debtors for contribution; and no question was then raised as to separate liabilities. Tarinee Kant, on obtaining a joint decree against four of his co-debtors on the 21st of August 1862, took out execution, and recovered from Ram Soonduree Dabee alone, who is the plaintiff in the present case. Whereupon, Ram Soonduree Dabee brings the present action for contribution against the other co-debtors, namely, against the son of Shama Kant Lahoree, the adopted son of Huro Soonduree Dabee, and Huro Soonduree Dabee herself, the amount claimed after deducting the plaintiff's share being Rs. 1,199-15-7, principal and interest. Both Courts have given plaintiff a decree.

The first objection taken in special appeal is that the present suit for contribution ought to have been dismissed, as the plaint does not specify the several liabilities of the defendants, nor seeks for a separate decree as against the several defendants respectively; secondly, that the special appellant, Obhoy Kant Lahoree, not being a party either in the original suit of Bhyrub Chunder Chowdhry or in the contribution suit brought by Tarinee Kant Lahoree, he cannot be liable for the plaintiff's claim. The third ground takes objection to the principle upon which both the Lower Courts have decreed the case, namely, making the defendants liable in proportion to their respective shares in the

parent Pergunnah Mymensingh, whereas it is contended, in special appeal that the defendants were responsible only for that portion of the land of which they were in wrongful possession. We think there is nothing in these grounds to induce us to interfere with the decisions of the Courts below. The first ground of objection was not taken by Obhoy Kant Lahoree in the first Court; his plea in the first Court being that he was not liable for any debt incurred by his adopting mother, because the suit was carried on in her own right, and not on his behalf or for his benefit, and also because his adoption was subsequent to the decision in the main suit. However, although this objection was not taken in the first Court, we think there is nothing in it, inasmuch as this suit is for contribution. Huro Soonduree represented Obhoy Kant in the suit brought by Tarinee Kant, and no objection was taken in that case, nor did the plaintiff Huro Soonduree or the other co-debtors ask the Court to decide upon their separate liabilities.

On the second point, namely, whether the special appellant is liable or not, we find that the first Court clearly found that Huro Soonduree had represented the estate in the first suit brought by Bhyrub Chunder, and also that her contention in that suit was that she inherited the property in dispute from her husband, and that she with the other defendants in the suit claimed the lands under a zemindary title, alleging that those lands belonged to the zemindary of Mymensingh, and not to the zemindary of Jaffershye. The adopting mother having therefore claimed through her husband, and not having carried on the suit in her own right, we think that the objection that the special appellant cannot be held liable for the plaintiff's claim is altogether untenable.

Then with reference to the principle on which the Lower Court has awarded the liabilities, we think that the principle is a right one; for in the original suit, as already observed, there was no plea that the lands in dispute were in the occupation of the answering defendants in any other way but under their zemindary title. Therefore, we think that the only way in which the liabilities of these parties in the contribution suit could be awarded was by making each party pay according to the shares they hold in the parent zemindary.

The special appeals are dismissed with costs.

The 22nd May 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock,
Sir Montague E. Smith, Sir Robert
P. Collier, and Sir Lawrence Peel.

Ejectment—Onus Probandi.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Ranee Shornomoyee

versus

Watson & Co. and others.

Where a party seeks to turn out another in possession of chur land, which plaintiff claims as a part of a mehal purchased by him from Government, the suit is in the nature of an ejectment suit, and the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary. It is immaterial in such a case to consider whether or not the land is the property of the defendant; because, unless it is proved to be the property of the plaintiff, the latter is not entitled to turn out the former.

If ever there was a clear case, this is one which falls within that description. The suit is brought to recover 15,000 beegahs of chur land to the east of Chilmaree Dara. It is claimed by the plaintiff as part of a khas mehal purchased by her from the Government of Bengal on the 15th January 1864.

The defendants are in possession of the land, and were found by the Magistrate in a proceeding under the Code of Criminal Procedure to be in possession. The plaintiff seeks to turn them out. The suit is in the nature of an ejectment suit, and the plaintiff must recover upon the strength of her own title, and not upon the weakness of that of her adversary. It is immaterial, therefore, in this case to consider whether the land is the property of the defendants or not, because whether it is their property or not, unless it is proved to be the property of the plaintiff, she is not entitled to turn them out; nor is it necessary to consider whether it ever was the property of Government or not, because unless the plaintiff can make out that, being the property of the Government, the Government conveyed it to her, she is not entitled to recover. The question depends upon what was sold by Government, and what was bought by the plaintiff. The certificate of sale is in these words, signed

by the Collector:—"I do hereby notify that the undermentioned Government khas mehal in the district of Moorshedabad, at a public sale held in the Collectorate of Moorshedabad under orders of the Board of Revenue, has been purchased on the 15th January 1864 by Ranee Shornomoyee, that is the plaintiff, as *sebait* of Luckhee Narain Deb Thakoor." The description is: "No. of towjee, 560;" "name of mehal, Chur Doomreah Island, Pergunnah Gons," "sudder jumma, Rs. 2,409-13-11." That is, whatever the plaintiff bought as Chur Doomreah Island was to be subject to a sudder jumma payable to the Government of Rs. 2,409.

It is important to remark that what the Government sold and what they professed to convey by the certificate was a khas mehal. The question is whether the khas mehal which the Government sold included the 15,000 beegahs which the plaintiff claims in this suit. It was necessary to go into evidence to show of what the khas mehal "Chur Doomreah Island, towjee No. 560," mentioned in the certificate of sale, consisted.

Going then into the evidence, we find that in the agreement which the plaintiff signed for the purchase of the estate (page 8 of the second supplemental record, No. 11) the land is described in the same way as it is in the certificate of sale, but with this addition, *viz.*, that the quantity of land is stated to be beegahs 10,377-10-2. Now it is not disputed that the plaintiff has got as much as 10,377 beegahs; but she claims to have 15,000 beegahs to the east of Chilmaree Dara in addition as included in her purchase. It would require very strong and very clear evidence to satisfy the minds of a Court of Justice that, under a description of an estate said to contain 10,377 odd beegahs of land, the Government officers were so negligent of their duty as to sell, and the plaintiff so fortunate as to purchase, 25,000 beegahs, more than double the quantity expressed. If the plaintiff could satisfy us that she did buy, and that the Government did sell, and had the right to sell, that quantity, she would make out her case.

Now, the way in which the plaintiff attempted to make out that she did purchase the 15,000 beegahs of land claimed is this. It is said that the number of the towjee is described as 560, and that the survey map of 1853 includes the whole of the land claimed as the 15,000 beegahs, and that at the foot of the map there is an entry "No. of the towjee 306 of the former resumption, and

* From the judgment of Seton-Karr and Macpherson, JJ., in Regular Appeal No. 66 of 1867, decided 11th February 1868,—9 W. R., 259.

No. 560 of the present:" consequently it is said that the lot sold to the plaintiff being No. 560 in the towjee included the whole of the land claimed, and that it cannot be cut down by showing that in the agreement signed by the plaintiff she admitted that what she purchased was 10,377 beegahs odd.

But let us see whether the entry in the map shows that No. 560 of the towjee at the date of the conveyance on the 5th February 1864 did include the 15,000 beegahs of land claimed. Assuming for the sake of argument that No. 560 of the towjee in 1853 did include the land claimed, it does not necessarily follow that No. 560 of the towjee on the 5th February 1864, when the certificate was signed, also included it.

Now, in order to see what was included in the certificate of sale as Chur Doomreah Island, we must refer to the proceedings which took place before Mr. Octavius Toogood, the Officiating Deputy Collector of Zillah Moorshedabad, on the 30th January 1856. He says:—"It is evident from a perusal of the papers of the settlement record of Chur Doomreah resumed by the Government, comprised within Pergunnah Goas, that, from the investigation held by the former Collector of this district, it was found that 25,000 beegahs of land having been thrown up in the vicinity of Doomreah, by the rivers Pudma and Mohanunda, were held in possession of by Rajah Oodwund Singh, the zemindar of Hoodda Anyepore, when the said Collector, in conformity with the directions of the members of the Sudder Board, dated the 24th January 1826 A.D., preferred a claim to the said lands on behalf of Government under Regulation II of 1819. Upon which an itlanamah having been served on the possessor, defendant, calling upon him to adduce evidence, and the said defendant having produced his documentary evidence, &c., the claim of the Government was dismissed on the 26th September 1828, and the papers of the record forwarded to the said Board. Subsequently the duties of the Revenue Board having become dischargeable by the Revenue Commissioner, the Revenue Commissioner dissatisfied with the decision of the said Collector, preferred an appeal therefrom to the Court of the Special Commissioner at Calcutta. Whereupon the said Special Commissioner having found that out of the lands in dispute, beegahs 6,723, all around which the rivers Pudma and Mohanunda flow, were regarded as new accretions under the designation of jazeera,

"reversed the decree of the Collector, and gave a decree in favor of Government, forwarding the resumption decree to the Commissioner of Revenue." From this it appears to have been found that, out of the lands in dispute, 6,723 beegahs formed an island, which, under Regulation XI of 1825, belonged to the Government. It then went on to show that 6,179 beegahs of the said land were settled in ijara or lease to Mr. Dalrymple, at an annual jumma of 2,294 rupees, for a term of ten years, and that before the expiration of the said term, Mr. Abercrombie, the Collector, went into the mofussil, and that he then found that a portion of the lands which had existed at the time of the lease to Mr. Dalrymple were diluviated; that new accretions had formed, and that some portion had been settled with ryots. It goes on thus:—"The former ijaradar (that is Mr. Dalrymple) having been desirous of entering into an ijara settlement at the old rate, a report was submitted to the said Commissioner, asking for specific directions as to whether a settlement of the said mehal should be entered into with the former ijaradar at the old rate, or whether a settlement thereof should be made after making a fresh measurement and assessment of rent. In reply thereto the said gentleman forwarded a letter, No. 50 of the 18th December 1854, directing a fresh measurement and jumma bundee (rent-roll) to be made, and the said Collector, accordingly, with the sanction of the Commissioner, conveyed in his letter of the 27th January 1855, appointed Bissonath Dutt, ameen, together with a mohurrir, to make a fresh measurement and jumma bundee."

There was an express direction that the land to the east of the Chilmaree Dara was not to be measured or included in the ijara. It appears that the ameen subsequently measured the mehal and found it to contain 11,381 beegahs odd, including waste, land under water, roads, &c., and that a fresh ijara settlement was entered into with Mr. Dalrymple, the former ijaradar, for a term of ten years, commencing from the 1st of May 1855, at an annual rental of Rs. 2,409-13-11.

It is perfectly clear from the proceeding referred to that the ijara to Mr. Dalrymple, which was to commence from the 1st of May 1855, did not include the land to the east of the Chilmaree Dara. It is also clear

from the plaintiff's own petitions and from her plaint that she never considered that she had purchased anything more than what was included in Mr. Dalrymple's ijara.

In the petition which the plaintiff presented to the Collector after the expiration of Mr. Dalrymple's second ijara, she says, by her agent, "I purchased the above mehal," that is, the mehal called Chur Jazeera Doomreah, "on behalf of the above-named thakoor," that is the idol, "in the month of Pous-1270 B.S., and I did not receive possession thereof till the 30th April 1865, on account of the ijara settlement of Mr. Dalrymple. On the expiry of the term of this settlement I prayed for possession." She never thought of claiming possession of anything until Mr. Dalrymple's ijara came to an end, and then she thought her title had accrued to receive possession of the land included in the ijara to Mr. Dalrymple. Then, again, in the petition presented under Section 318 of the Criminal Procedure Code, the plaintiff, by her agent, said, "Mr. James Dalrymple took a conditional ijara of the said mehal from the Collectorate of this zillah on the part of Government." There, again, showing that what she was seeking to recover was the mehal of which Mr. Dalrymple took an ijara.

Then in the plaint she says:—"The Island Chur Doomreah, a Government khas mehal, recorded No. 560 in the rent-roll of the collectorate of this city of Moorsheda-bad, was purchased by me at a Government sale on the 15th January of the year 1864, in the capacity of a *sebait* of the aforesaid idol, and I have obtained the bynamah (certificate of sale). The Government concluded successive temporary farming settlements of the said mehal with Mr. Dalrymple. The term of the farming lease expired on the 30th of April in the year 1865. I held the proprietary right from the date of my auction-purchase up to the expiration of the ijara lease, and on the expiry of the term of the ijara lease I obtained khas possession through the nazir and ameen under orders of the Collector of this district."

It is clear that the Government merely intended to sell, and that the plaintiff intended to purchase, the khas mehal which was held by Mr. Dalrymple under the ijara, and that on the measurement of the lands included in the ijara those to the east of the Chilmaree Dara were expressly directed to be excluded.

The plaintiff can have no title to those lands whether they belonged to Government or to the defendants. The authorities which have been cited are not applicable to the facts of this case. The plaintiff has made out no title to the land which she has claimed.

It is said that the question was never raised on the pleadings, but it is clearly raised, not only in the pleadings, but in the issues. In the written statement of the defendants, Robert Watson & Co., at page 3, paragraphs 2 and 3, the question appears to be raised distinctly. They say:—"As to the claim to obtain possession of about 15,000 beegahs of land lying within the boundaries specified in the *thak* map of the year 1853, on the allegation that the said lands are jazeera (island) Chur Doomreah; these lands are not included in the said island." The same defence was also set up in the written statement of Messrs. Jardine Skinner & Co. in the third and fourth paragraphs at page 5.

There was also a distinct issue whether the 15,000 beegahs were part of the jazeera, and whether the plaintiff, in virtue of her auction-purchase, could claim and obtain possession of the disputed land or not. The defence set up was that the plaintiff, by virtue of her auction-purchase, was not entitled to the 15,000 beegahs, and distinct issues were raised as to whether she was entitled to them or not. The High Court came to the conclusion that she was not entitled, that she never intended to purchase, and never did purchase, and that the Government never intended to sell, and never did sell, to the plaintiff any portion of the 15,000 beegahs to the east of the Chilmaree Dara.

Their Lordships entirely concur in the opinion of the High Court. It is not necessary to go into all the reasons expressed in the judgment of Mr. Justice Seton-Karr, which have been commented upon in the argument at the bar, but their Lordships concur entirely in the opinion at which the learned Judges arrived, namely, that the plaintiff, by reason of her purchase, never got a title to the 15,000 beegahs which she claims on the east of the sota.

Under these circumstances, their Lordships will humbly recommend Her Majesty to affirm the decision of the High Court, with the costs of this appeal.

The 29th May 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock,
Sir Montague E. Smith, Sir Robert
P. Collier, and Sir Lawrence Peel.

*Mahomedan Law—Divorce—Marriage—
Evidence.*

*On Appeal from the Sudder Dewanny
Adawlut of Calcutta.**

Khajah Gouhur Ali Khan

versus

Khajah Ahmed Khan.

Although writing is not necessary to the validity of a divorce under Mahomedan law, yet where a divorce takes place between persons of rank and property, and where valuable rights depend upon the marriage, and are affected by the divorce, the parties, for their own security, may be expected to have some document affording satisfactory evidence of what they have done.

If a Cazeer was present at a marriage which is disputed with a show of probability, he should be called as a witness when the marriage is to be proved.

THIS is an appeal in a suit originally brought in the Civil Court of the City of Patna by the present appellant, Khajah Gouhur Ali Khan, who was the nephew and one of the heirs of Mahomed Ibrahim Khan.

The suit was brought by him as one of the heirs, together with a lady Fatima-toonissa, who was the mother of Mahomed Ibrahim Khan, against Khudijah Begum, who claimed to be the widow of the deceased Mahomed Ibrahim Khan. After his death she, claiming as his widow, obtained, in a summary suit brought in the Civil Court at Patna, possession of one-fourth of his property, under the provisions of Regulation XIX of 1841. It appears that there was an appeal in that summary suit to the Sudder Court, which affirmed the order.

The present suit was brought in regular form to set aside those summary orders and to obtain possession of the one-fourth of the property which Khudijah Begum had retained under them, upon the allegation that she had been divorced by Ibrahim Khan; and the only question raised which it is now necessary for their Lordships to consider is whether Khudijah Begum was divorced or not. It was alleged by the mother and the nephew that a divorce had taken place in the year 1845. The Judge

of the Civil Court of Patna decided in favor of the claim of the widow. There was an appeal to the Sudder Dewanny Adawlut, but no decision was given by that Court upon the present issue. It appears that in a former suit, where the legitimacy of Khajah Gouhur Ali Khan, as the nephew of Mahomed Ibrahim Khan, was in issue, a decision had been given against his being the legitimate nephew; and the Sudder Dewanny Adawlut, on the appeal to them in this suit, affirmed the decision of the Judge of the Civil Court of Patna, not upon the ground upon which he had decided, but on the ground that the appellant had not proved himself to be the legitimate nephew.

The case, therefore, comes before their Lordships substantially on appeal from the decision of the Civil Court Judge. The question is entirely one of fact, and their Lordships are unable to come to the conclusion that the Judge of the Civil Court of Patna was wrong in holding that the divorce was not proved. The claimant was the wife of Mahomed Ibrahim Khan. She had been married a considerable number of years to him, but undoubtedly there had been a separation as early as the year 1827, and in that year suits had been brought both by the husband and the wife. The husband brought a suit in the nature of a suit for restoration of marital rights against the wife; and she brought a suit against him to recover her dower, or so much of her dower as was prompt; and in both these suits, which were continued about five years in the Courts, decrees were given for the plaintiffs; one in the year 1831, and the other in the following year, 1832; that is, the husband obtained a decree for the restitution of conjugal rights, and the wife obtained a decree for the share of her dower which was prompt. It seems that from 1832 down to 1845, no steps were taken to enforce the decrees on either side. There is no evidence as to the terms upon which the husband and wife were living in that interval of time, but it would seem that they were living apart.

In July 1855 both parties presented petitions in their respective suits, praying that satisfaction might be entered upon the decrees. The petitions alleged that they had compromised the suits, and desired to abandon any rights that they might respectively have under their decrees. Those petitions clearly indicate that, up to that time, no divorce had taken place. Although there had been a separation, although these decrees had been obtained

* From the judgment of Colvin, Sconce, and Torrens, Judges of the late Sudder Dewanny Adawlut, in Regular Appeal, No. 236 of 1855, decided 2nd December 1857,—S. D. A. Reports for 1857, page 1861.

and the parties had lived separately, yet no dissolution of the marriage by divorce had at that time taken place. Indeed, it is not contended on the part of the appellant that a divorce had then been effected, but it is said that a short time afterwards Mahomed Ibrahim Khan went to the house of his wife, and that there was a formal divorce, or the commencement of a formal divorce; that words of divorce were then spoken by him and assented to by her, and that this formal divorce was repeated on two other occasions, at intervals of a month between each formal act.

The question is, whether their Lordships can rely upon the evidence of the witnesses who say that such a transaction took place. The same witnesses who are called to prove the divorce assert that, shortly after this alleged divorce, Khudijah Begum married a Mahomedan of wealth and rank of the name of Mahomed Hossein, and lived with him openly in the city of Patna. The plaintiff asserts not only the divorce, but the second marriage,—that the second marriage took place in the lifetime of Mahomed Ibrahim Khan, and shortly after the divorce.

Now, it is to be observed in the first place, that there is no writing whatever produced to prove that the divorce took place, or to corroborate the statement of the witnesses. It is quite true that writing is not necessary to the legal validity of a divorce under Mahomedan law, but where a divorce takes place, as in this case, between persons of rank and property, and where valuable rights depend upon the marriage and are affected by the divorce, one would certainly expect that the parties, for their own security, would have had some document which should afford satisfactory evidence of what they had done. In the suit for restitution of conjugal rights, Mahomed Ibrahim Khan himself spoke of the necessity of such a document when the wife alleged that he had before that suit divorced her, which shows that in his contemplation (although he was wrong in supposing that it was necessary) it might be expected that amongst persons in his position such a document would have been executed. However, there is no such document; there is no writing whatever referring to the divorce, and therefore the case depends entirely upon the credit to be given to the witnesses who say that they were present during the transaction, and who also say that they were present at the second marriage. Of course,

if the second marriage during the lifetime of Mahomed Ibrahim Khan had been satisfactorily proved, it would of itself have been cogent evidence of the fact of the divorce, but that marriage is even less satisfactorily proved than the divorce itself. The witnesses who deposed to both transactions being the same, the divorce derives no substantial confirmation from the evidence which has been given of the subsequent marriage.

The Judge of the Civil Court of Patna heard these witnesses. They were all examined in his presence, and it is impossible not to consider that the Judge who hears the witnesses is really the best person, and very often the only person, who can judge of the credit to be given to them, because he not only hears what they have to say, but he observes the manner in which they say it. He is also much more conversant with the general position of the persons who come before him than any Court of appeal can be. What he says of the witnesses is that their depositions are unworthy of any credit. He further says that, with the exception of one or two, the whole were illiterate and low people, and they certainly seem to be so.

Then, on which side is the balance of probabilities? The case on the part of the appellant is that this lady, in the lifetime of her first husband, married and lived with Mahomed Hossein in the City of Patna, and one or two of the witnesses, when asked how they knew it, say that it was impossible for a man of the rank and wealth of Mahomed Hossein to be married without the people in the city of Patna knowing it. If this be so, it certainly seems a most improbable circumstance that Mahomed Hossein, a gentleman of position in Patna, should have allowed his wife to come forward in the Court of Patna and claim a share of the estate of Mahomed Ibrahim Khan, upon the assumption that she was his lawful wife down to the time of his death. That is, in their Lordships' view, a very strong improbability.

Then, with regard to dower; if she had been divorced she would have been entitled to her dower, not only to the prompt dower but to the whole of it; but she neither sued for her dower, nor is there any arrangement satisfactorily proved with regard to her remission of it.

One or two witnesses say that she did, behind the curtain, use the words that she had remitted the dower, but only one or two

of the witnesses venture to say that, and it does seem incredible that, if she was entitled to a large dower, she should have given it up without the husband obtaining from her some writing or other authentic evidence of her having so released it, particularly as she had once before sued for the prompt dower and had obtained a decree, and that suit was very formally compromised by the petition to which reference has already been made.

There is an improbability referred to by the Judge of the Civil Court with regard to the ceremony alleged to have taken place on the second marriage. It appears that the lady was of the Soonee school, and Mahomed Hossein of the Sheeah, and the Judge says what appears to be well founded, *viz.*, that the ceremony would usually be according to the school to which the husband belonged. In this case it was the other way. That is an improbability, and it may be that these witnesses, who, many of them, were ignorant persons, were not aware, when they gave their evidence, that it would be open to the observation that it was an improbable story they told.

It is to be observed that, according to some witnesses, the Cazeer was present at the second marriage. If this be true, the Cazeer should have been called as a witness; but he was not examined, nor his absence accounted for.

Their Lordships think it unnecessary to go at any detail into the evidence. They see no reason for coming to a different conclusion from that at which the Judge of the Civil Court at Patna has arrived, and they do not feel justified in saying that he is wrong when he has recorded that the witnesses who came before him were, in his opinion, unworthy of credit. If they are unworthy of credit, as the whole case depends upon their testimony, and the onus is upon the plaintiff to prove the divorce which he alleges, the case necessarily fails.

Although, in their Lordships' view, the decree of the Sudder Court ought to be affirmed, their opinion proceeds upon the ground on which the Civil Judge of Patna dismissed the suit, and not upon that on which the Sudder Court affirmed his decision. The affirmance of this decree will not, therefore, prejudice the status of the appellant as the nephew of Mahomed Ibrahim Khan.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the Sudder Dewanny Adawlut, which is the judgment appealed from, and to dismiss this appeal with costs.

The 7th June 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Preemption—Purchase—Money.

Case No. 1231 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 27th May 1872, affirming a decision of the Moonsiff of Futickcheree, dated the 18th July 1871.

Buksha Ali (Plaintiff) *Appellant*,

versus

Tofer Ali (Defendant) *Respondent*.

Baboo Aukhil Chunder Sen for
Appellant.

Baboo Mohinee Mohun Roy for
Respondent.

A party, who, through execution proceedings, obtains possession of land which is bound by a right of preemption, ought to have the benefit of the purchase-money which the preemptor is to pay.

In order to give a right of preemption, the sale must be complete.

Couch, C.J.—THIS suit was brought by the plaintiff to enforce a right of preemption to certain property, and the Moonsiff found, on the issue relating to it, that the plaintiff had observed the necessary preliminaries and offered the consideration money as required by law; but, upon the fourth issue, he found that one Hisamooddeen ought to be considered the rightful owner of the land of which the plaintiff claimed to be the preemptor; that Hisamooddeen was in possession, and that being the case, the plaintiff could not obtain a kobalah from Tofer Ali, defendant.

On appeal from this decision the Subordinate Judge decided against the plaintiff, affirming the Moonsiff's decree: and an application being made to him for a review, he again decided against the plaintiff upon the ground that Hisamooddeen appeared to

have substituted himself in an execution case against the vendor, and to have obtained possession of the land from the plaintiff before the suit was instituted. He found also that the sale by Kaloo to Tofer Ali was made upon a condition that the vendor was to have an *itmám* of the land from the purchaser, which was not given, and the parties rescinded the contract.

From this decision there is a special appeal.

There are two objections to the plaintiff's recovering in this suit. One appears in the judgment of the *Moonsiff*. It appears in his finding, which is adopted by the Judge, that the person who was in possession of the land and obtained it through some execution proceedings, was not made a defendant in the suit. Assuming that there is a right of preemption which binds the land in his possession, he ought to have the benefit of the purchase-money which the preemptor would have to pay. If he is to lose the land, he ought to get that which would have to be paid for it. It would be most unjust to allow the vendor to receive the purchase-money. That would be one objection to the plaintiff's having a decree in this suit.

But further, the contract appears to have been made subject to a condition, and that not having been performed, the sale did not become a complete one. In order to give a right of preemption, the sale must be complete. There must be, as is said, an entire cessation of right on the part of the vendor. In this case, there was not an entire cessation of right. Until the condition was performed, the vendor retained his right to the property. He was not bound to part with it until then. It would seem that the parties, knowing that the condition could not be performed, rescinded the contract before the expiration of the time fixed for performing it. But that is a different case from the one alluded to in the *Hidayah*, where the contract being complete, and the vendor having entirely parted with his right, the vendor and purchaser subsequently agree to treat the contract as rescinded, and the vendor is to take back the property. It may well be that they cannot, by making what is in fact a new contract of resale, defeat the right of preemption.

In this case there had not been a complete sale. The vendor had not parted with his entire right in the property. We think, therefore, that the decision of the Lower Courts is right, and the appeal must be dismissed with costs.

The 12th June 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Mohunts—Muths—Endowments—Tirpantal—Benares.

On Appeal from the High Court of Judicature at Agra, N. W. P., Bengal.

Kashi Bashi Ramling Swamee

versus

Chitumbernath Koomar Swamee.

The mohunt of the muth at Tirpantal, Zillah Tanjore, in the Madras Presidency, sued the mohunt of the muth at Benares in the Civil Court of Zillah Benares, for the right to manage as proprietor the muth and chuttur affairs at Benares and the temple of Sri Kedaresur, and to recover property belonging thereto, and to have an account of receipts and disbursements relative to the same: such relief being claimed by virtue of his proprietary right as mohunt and guddeenashen of the head-quarters muth at Tirpantal, under whose jurisdiction and power the chuttur institution at Benares had continued from time immemorial. The defendant denied plaintiff's claim to the immoveable property and endowment which he represented as acquired by his ancestors, the mohunt's guddee-nasheens at Benares, and himself. He denied that he was an agent, and claimed to be the real proprietor in possession and occupation by right of succession to his ancestors.

The first Court decreed plaintiff's claim. The High Court modified the decree, giving plaintiff possession of certain chuttur and gardens built or purchased out of funds remitted from Madras, and declaring him entitled to an account of a sum admitted to have been remitted from Tirpantal, but holding that he had failed to make out possession of the muth, temple, or other property:

Held that the original foundation having been admittedly at Benares, which is the holy place, and the object having been to afford, to persons either resident in the south of India or making pilgrimage to Benares, facilities for worship and religious duties there, raised a presumption that the establishment at Tirpantal was subordinate to that at Benares. And that it was not shown that any change had been effected in the original constitution of the community.

Held that the nature of the relations between the muths at Tirpantal and Benares was that the former fed the establishment at the latter, the object of which was to afford facilities to pilgrims and others wishing to pay their devotions at Benares. The result was that the establishment at Tirpantal collected alms and remitted them to Benares, producing complicated exchange transactions between the two establishments.

Held that plaintiff had failed to establish either that he was the proprietor of the property at Benares, or that defendant was his mere agent, and that the High Court was right in limiting the relief to what was included in its decree.

THIS appeal has come before their Lordships *ex parte*. This is a disadvantage in every case, and it might be peculiarly so in one like the present, in which questions are raised the determination whereof depends, not so much upon the general law of property, as upon the rules—whether defined

by writing, or to be inferred from evidence of long usage—that regulate a particular religious community. Had their Lordships thought there was any real difficulty in the case, they would have taken time to consider their judgment, and would have gone carefully over the evidence contained in this voluminous record before they decided in favor of the appellant; but for the reasons which I am about to state, they are clearly of opinion that he has failed to make a sufficient case for disturbing the decree against which he has brought this appeal.

The appellant being the mohunt of the muth at Tirpuntal sued the mohunt of the muth at Benares in the Civil Court of that Zillah, his claim, as stated in the plaint, being the right to manage and superintend as proprietor the muth and chuttur affairs at Benares, and also to manage and superintend the temple of Sri Kedareshur, to recover certain moveable and immoveable property belonging to the said muth, chuttur, and temple, and to have an account of the receipts and disbursements relative to the said temple and chuttur, and the landed property claimed from the 15th of October 1864 up to the date of suit, together with subsequent profits and proceeds; such relief being claimed by virtue of his proprietary right as mohunt and guddee-nasheen of the "head-quarters muth of Tirpuntal, Zillah Tanjore, in the Madras Presidency, under whose jurisdiction and power the chuttur institution at Benares, &c., had continued from time immemorial, by removal of the possession and superintendence of the defendant, who had been acting as agent."

The plaint further stated that the particular cause of action arose on the disobedience of the defendant, on the mismanagement of the affairs entrusted to him, on the non-submission of the accounts contrary to a practice of old standing, on his acting unlawfully and dishonestly and inconsistently with the dignity of the muth, and on the assertion of his right to possession as proprietor of the chuttur, &c., at Benares, as appeared from a petition which he had filed in the criminal proceedings.

The written statement of the plaintiff somewhat amplified the case made by the plaint, and stated that "by the aid of the Rajahs of the Deccan, the custom of establishment of chuttur or charitable institutions by the Tirpuntal Kashi muth in various parts of India has existed for a very long time. The proprietor or the installed person always remains at the

"Kashi muth in Tirpuntal, which is the head-quarters. His duty has been to carry on the business of all other places by appointing agents to send money for necessary expenses to every one of the chuttur, and to test and keep a watch over the account of every kind of income (including the money sent by himself) derivable from the moveable and immoveable properties appertaining to the muth, chuttur, temple, &c., in each of those places, as well as other matters appertaining thereto. For Benares also, where the foundation of a chuttur was first laid, agents have successively been appointed for a long time; and it is now unnecessary to mention all the agents or managers nominated during the period of several centuries back." The plaintiff then states certain changes in what he calls the agency, and what on the other side is called the succession of the mohunts at the establishment at Benares, and then proceeds to state the non-render of the accounts, and the acts of failure of duty by the defendant as his agent.

The written statement of the defendant, after stating that the plaintiff was wrong in claiming as his property the immoveable property and the estate situated in the chuttur (sacred place), and the endowed property, contains the following passage:—"Those properties were acquired by and belong to the mohunts guddee-nasheens at Benares, the ancestors of the defendant, and the defendant himself. He holds deeds and documents of Courts in proof of this." The defendant is not an agent or manager: he is the real proprietor and guddee-nasheen, and in possession and occupation by right of succession to his ancestors." It then states certain facts as to the original foundation of these religious establishments, which seem to be admitted by both parties, and which will be considered thereafter.

Upon the case thus raised between the parties the Judge at Benares framed three issues. The first issue, which was as to the question of limitation, it will be unnecessary to consider, since it is now out of the case. The second issue was, "Who is the proprietor of the property situate in Benares?" and the third was, "Whether the defendant was the agent of the plaintiff or not?" The Judge of first instance, who tried the case, decided the two last issues in favor of the plaintiff, and gave him a decree for all that he claimed. The defendant then appealed to the High Court, and that Court modified the decree of the Judge below.

Their decree found that the plaintiff was entitled to the possession of certain chutturms and gardens, which, though situate at Benares, had, as the defendant had admitted, been built or purchased out of funds remitted from Madras; and accordingly decreed the possession of those properties to him. It also found him entitled to have an account of the expenditure of the sum of Rs. 45,777, which was admitted to have been remitted from Tirpuntal to the defendant since October 1864, and "to have an account of all rents and profits received from the chutturms and garden land aforesaid from that date;" but it held that he had failed to make out that he was entitled to possession of the muth and temple at Benares, or of any property other than that of which possession was thereby decreed to him.

Against that decree the present appeal is brought, and, there being no cross-appeal, the question is reduced to this—whether the High Court was right in limiting the relief given to the plaintiff to that just stated, or whether they ought to have gone on further and to have decreed that he was entitled to the possession of the whole of the property claimed, and, as an incident or a step to that relief, to the removal of the defendant from the office of mohunt at Benares.

It is admitted by both parties that the original establishment of this community was at Benares, that it took place some 300 years ago, that 150 years afterwards the establishment at Tirpuntal was set up, and that from that time the two were in communication together; but the dispute between them is whether the mohunt of Benares was in any sense the agent of the mohunt of Tirpuntal, or in any and what degree inferior to him and subject to his orders. Of the constitution of the original foundation, or of the terms upon which it was set up at Benares, there is really no evidence whatever. Nor is it shown by any direct evidence what alteration was introduced into the constitution of the community at the time at which the migration from Benares of part of the community to Tirpuntal in Tanjore took place, or what was then settled as to the relation of the two mohunts. What proof there may be on these points, is left to be collected from the voluminous correspondence which has been filed in the cause, and from the acts of the parties on the occasion of the different changes in the office of mohunt at the one place or the other.

The undisputed facts that the original foundation was at Benares, that Benares is

the holy place, and that the object of the foundation was to afford to persons, either resident in the south of India, or making pilgrimage to Benares, facilities for carrying on their worship and performing their religious duties there, seem to their Lordships to raise a presumption that the establishment at Tirpuntal was subordinate to that at Benares, rather than that the ancient foundation became subordinate to that at Tirpuntal. Such a presumption may no doubt be rebutted by evidence of the facts, but the question is whether there is in this case sufficient evidence to rebut it. It may be here observed that the persons who form this community appear to be more or less connected with establishments in places other than Benares and Tirpuntal, and particularly with one in the south of India, which was the place of residence of the person termed the gooroo, the history of whose interference on the occasion of one of the elections has some bearing on the direct questions raised in this cause.

It is further to be observed that, even if the story of the plaintiff as to the first establishment of the muth at Tirpuntal were correct, it would by no means follow, in the absence of evidence to that effect, that the mohunt who migrated from Benares to Tirpuntal had power to alter the original constitution of the community, or to say that Tirpuntal should thenceforward be its headquarters, and that the person in possession of the foundation at Benares should be the inferior, or mere agent of the mohunt at Tirpuntal. The change, and the authority by which it was effected, should have been distinctly proved. But of what facts is proof really to be gathered from the correspondence?

The correspondence set out in the record begins in 1843. At that time one Soke Ling was the mohunt at Tirpuntal, and the earliest letters relate to the appointment of a mohunt at Benares in the room of one Ayarub, deceased. The person appointed was Saminada; the respondent being then appointed to the second rank in the muth,—and, on the death of Saminada in 1846, he became mohunt of the Benares muth. It certainly appears that Soke Ling, being the elder man, and possibly the person whose disciple the respondent had been, was regarded with a high degree of reverence and respect by the respondent, and that the letters which were addressed by him to Soke Ling were rather the letters of an inferior to a superior than the letters of one

upon equal terms with his correspondent. But Soke Ling fell ill, and wished for the appointment of a successor; and it results, in their Lordships' opinion, from the correspondence, that the successor, whose name was Gunput, was appointed by Soke Ling with the concurrence of the respondent, the then mohunt at Benares, and that that concurrence was treated as essential to the validity of the appointment. And when Soke Ling died and Gunput became the mohunt actually in possession of Tirpuntal, the character of the correspondence is very much changed. The character it then assumes is that of a correspondence between a mohunt at Tirpuntal who felt himself to be in some degree the inferior of the mohunt at Benares, looking up to him and seeking instructions from him, much as the respondent had previously sought instructions from Soke Ling. Again, Gunput's reign was a short one, and when he died, the present appellant, then a young man of about 21, was appointed; and it is perfectly clear from all that preceded and accompanied that appointment that the respondent, as the mohunt at Benares, was looked to as the person whose concurrence was necessary, and whose advice in all the difficulties attending that appointment was sought, and that for several years after Ramling got into possession, he looked to the mohunt of Benares rather as his superior than (as is represented by the plaintiff) as his agent and a person simply subordinate to him. There were great difficulties at the time of that election, because a third party, the gooroo, came in and set up a claim to put in his candidate as the mohunt of Tirpuntal. There was an appeal to the civil authorities, and not only did Ramling, the appellant, bring his claim before them, but at his instance and on his invocation the respondent came forward and made a representation in support of that claim. And what he then stated in his letter to the Collector and Magistrate of Koombhone seems to their Lordships to embody that which is fairly to be inferred from the correspondence as the true condition of things, and the true account of the constitution and relation of the two muths and their respective mohunts. He says in that letter:—"I respectfully beg to state that since a long series of years there have been two muths, one at Benares, and the other at Tirpuntal, Zillah Koombhone, in the Madras presidency, to which are attached landed property for their support and two mohunts to manage them respectively.

"From the income of the landed estates of and the donations of several Rajahs of Deccan to each muth, its expenditure is defrayed, establishment is maintained, and the revenue of Government paid by its respective mohunts. But it has been the usual custom that, when the mohunt of either muth is to nominate a deputy or successor to himself, he is obliged to secure the consent of that of the other, as will be seen in the case of the late Soke Linga Swamee, who, while confined to his sick bed, invited me over to Tirpuntal to make arrangements about the muth thereat, and choose and nominate a successor to him." And then after stating what was done on the occasion of the appointment of Gunput, he goes on to say with respect to the appointment of the appellant:—"Gunput Tumbran, having been ill for the last two months, requested my permission to entertain Ramlinga Tumbran as his assistant during his life-time, and his successor after him. On my intimating through a letter my compliance with his request, Ramlinga was chosen his assistant and successor or since the 5th November 1853, on condition that he (Ramlinga) should serve under my direction. Further, Gunput Tumbran begged me hard to grant a formal deed of appointment to his assistant and successor" (Ramlinga Swamee), "which I have sent him in English on stamped paper, dated 28th November 1853, and attested by credible witnesses." That deed is not produced, but its existence is fully admitted by the plaintiff himself in his letter of the 16th of December 1853 to the respondent, in which he confirms the respondent's statement of the relation between them and gives an account of the proceedings before the Collector. That letter contains the following passage:—"I replied also that the Swamee in Kashi, having made me the 'malik' of this place, had sent a letter to me, and the Collector desired me to produce that letter. I produced it, and the Collector having inspected it, caused the letter inside the envelope to be fully read out to him. He afterwards inquired where was the deed of permission in my favor, which appeared from the purport of your letter to have been received by me from Kashi, and I replied that it was with my man, and the above-named tehsildar, having snatched it from him, gave it to his man to take it to Alganath Swamee."

Whether this deed of appointment could

have been produced in this suit, or why, if it could have been produced, it has not been produced by the appellant in whose custody it would naturally be, has not been shown. But in their Lordships' judgment the passages of the correspondence which have been cited, and indeed its whole tone, are altogether inconsistent with the appellant's contention that the mohunt at Benares was merely the agent of the mohunt at Tirpungal, or that the latter was the real proprietor of the foundation at Benares, and therefore negative the title set up in his pleadings.

That there may have been, and that there ought to have been, accounts between these establishments their Lordships see no reason to doubt. The nature of their transactions appear to be of this kind. The muth at Tirpungal fed, as it were, the establishment at Benares, the object of which was to afford facilities to pilgrims and others who wished to pay their devotions at Benares for so doing. The result of the system was that the establishment at Tirpungal collected the alms of the faithful in the south of India, and remitted from time to time considerable sums to Benares. Many of these sums had a special destination. They were directed to be applied to particular purposes, such as throwing the ashes of Rajahs who had died in the south of India into the Ganges at Benares, or the performance of special services to the idols there, or to the establishment of special charities. This state of things produced complicated exchange transactions between the two establishments; and the correspondence shows that there was very often a considerable deficiency of funds in each of them; each at times having to borrow money as it best could. There was, therefore, necessarily an account current between them; the one having to keep the other instructed as to the funds in hand, the funds required, the liabilities incurred, and the like particulars.

It has, however, been argued that from certain items in the accounts produced, which relate to the rents of property at Benares, and to the expenditure of moneys upon the pushta and other things belonging to the temple at Benares, it is to be inferred that the whole of the property at Benares was held by the mohunt at that place subject to the orders and as a mere agent for the mohunt at Tirpungal.

Their Lordships do not think that this is a necessary or fair inference from those items of account. They may, in their Lordships' opinion, be accounted for by supposing that

they were inserted in order to show what was the state of funds at that time at Benares, and what the available means of the mohunt at that place. Their Lordships cannot infer from them, against all the evidence afforded by the correspondence, that the relation of the two mohunts was that of principal and agent.

Now, this being their Lordships' view, it seems to them that the plaintiff, who had to make out his case, has wholly failed to establish the affirmative of either of the two issues settled, and to prove either that he was the proprietor of the property claimed at Benares, or that the defendant was his mere agent; and, therefore, if they had been trying the case in the first instance, they would have had serious doubts whether the suit, being misconceived and founded on an alleged title which the evidence failed to support, ought not to have been wholly dismissed. It was proved, however, that in the year 1865, the appellant being dissatisfied at not receiving regular accounts, went to Benares, and that the respondent, who appears to have then become somewhat old and ill, and at one time not unwilling to retire altogether from office, executed an ikrarnamah, by which he agreed to render accounts, and the High Court acting upon that has decreed that there should be an account of the moneys remitted from Benares since that date. Also the respondent appears to have made in the course of the trial an admission that certain of the chuttur claims had been erected out of moneys remitted from Tirpungal, and the High Court considered that this was sufficient to give the mohunt at Tirpungal a right to the possession of those chuttur.

It is not necessary for their Lordships, as there is no cross-appeal, to consider whether a title to disturb the possession of those chuttur was properly established, a question on which they intimate no opinion; but they have come to a clear conclusion that the plaintiff has wholly failed to make out any title to the general property of the muth at Benares, and that, therefore, the High Court was at all events right in dismissing the rest of his suit and in limiting the relief given to that which is included in its decree.

Mr. Leith also argued that the High Court ought on its own principles to have gone further, and directed that there should be a change of possession of any other lands or houses which might be found to have been purchased by means of the money of which an account was directed. Their Lordships are disposed to think that all the relief to

which the appellant may be entitled, consistently with the decree or as consequential thereon, may be had in working out the account. But in any case, taking the view which they have already expressed of the rights of the appellant, and considering the danger of interfering with the management of the affairs of this religious community upon such imperfect information of its nature and constitution as is given by the record, they are not disposed to recommend any additions to the decree.

Under these circumstances their Lordships think it will be their duty to advise Her Majesty simply to affirm the decree of the High Court, and to dismiss this appeal.

The 19th June 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Settlement with Co-sharers—Possession.

Case No. 93 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Cuttack, dated the 13th August 1872, affirming a decision of the Officiating Moonsiff of Dhamnuggur, dated the 28th March 1872.

Abheemunno Dobey (Defendant) *Appellant,*

versus

Rungodhur Kur and others (Plaintiffs)
Respondents.

Baboo Mohendro Lall Mitter for Appellant.

Baboo Obhoy Churn Bose for Respondents.

Certain sharers in a zemindaree having agreed, in the absence of a co-sharer G, to settle with the Collector for themselves and to take the share of the absent co-sharer as zemindar, a settlement was made accordingly. G afterwards returned, and applying for *dakhil-kharij* had his name entered as one of the proprietors. Afterwards the Government issued a proclamation by which the term of the existing settlement was extended 30 years. G then sold his share to defendant who got into possession. He was then sued by the other co-sharers who sought to recover possession:

Held, that they took settlement of G's share not adversely to him, but expressly as zemindars, or in a sense as trustees, and as his representative was now in possession they must show their right before they could gain possession.

Jackson, J.—We are of opinion that the ground on which the Lower Appellate Court,

as well as the Moonsiff, has proceeded in this case is erroneous. It appears that a settlement of the property in dispute going to be made in 1843, one Gobind Mohanty, one of the persons entitled to it, was absent, and did not appear before the Collector. The Collector thereupon called upon the other co-sharers to state whether they agreed to settle for themselves and take the share of the absent co-sharer as zemindar, and they having signified their assent a settlement was made accordingly. Gobind Mohanty afterwards returned, and although he did not apply to the Collector to give him his share and to make settlement with him, he did apply for the proceeding which is called *dakhil-kharij*, and had his name entered as one of the proprietors of the property. In the year 1274 the Government appears to have issued a notification by which it was declared that all existing settlements were continued for a further period of 30 years. By this proclamation it seems to us that, so far as the Government was concerned, the term of the existing settlement was so extended as if the period originally fixed had been for 30 years more. In this way the relation of the co-sharers, with reference to the share of Gobind, continued exactly what it had been before. Gobind has now sold his share to the defendant, and the defendant has got into possession of that share. The plaintiffs sue to recover possession of it. The ground on which the Courts below have held the plaintiffs entitled to a decree is this,—that, by the omission of Gobind to assert his right to the settlement as regards his share, he has allowed the other co-sharers to retain possession which as against him has become adverse. This view of the case, however, appears to be directly contradicted by the terms of the settlement to which the co-sharers assented. They took settlement of Gobind's share, not in any sense adversely to him, but expressly as zemindars or in a sense as trustees. In the argument before us to-day, the extraordinary position was advanced by the vakeel for the respondents, firstly, that they were created trustees for 30 years, and by the proclamation of 1834 they were made trustees for a further period of 30 years, and nextly that they could not be deprived of possession, but that the co-sharer Gobind was entitled to sue them for an account. Whatever the proceedings might have been which it was necessary for Gobind to take if he had been out of possession, it appears to us that, as he or his purchaser has got into possession, the plaintiffs must show their right before they

can be restored to possession. They fail to prove their right, and their claim to possession therefore also fails. The judgments of the Courts below are accordingly reversed, and the plaintiffs' suit dismissed with costs.

The 21st June 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Auction-Purchaser—Representations—Admissions—Adoption.

Case No. 1445 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 3rd July 1872, affirming a decision of the Additional Subordinate Judge of that district, dated the 29th December 1871.

Brojendro Coomar Roy Chowdhry (Defendant) *Appellant*,

versus

The Chairman of the Dacca Municipality, purchaser from Ranee Joy Doorga Dabee, mother and guardian of Rajah Brindañun Chunder Roy, minor (Plaintiff) *Respondent*.

Mr. J. T. Woodroffe for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

A person who purchases at a sale by auction in execution of a decree, although he may be the decree-holder, must be considered in the position of a purchaser for value.

A party is not concluded by his own representations unless they have been acted upon by the opposite party. If treated merely as admissions not acted upon, it may be shown by the party who made them that they were not true.

Quere.—What is the effect of admissions made by a person who subsequently adopts another, in binding the person adopted.

Couch, C.J.—THE plaintiff in this case sued as guardian of her minor adopted son to recover some land of which she alleged she

had been dispossessed by the defendant, the appellant before us, in execution of a decree which he had obtained against the second defendant.

The case of the appellant, the first defendant, Brojendro Coomar Roy, was that the defendant Anundo Chunder Doss had borrowed a sum of money of him; that he had sued Anundo Chunder Doss and recovered a decree and caused the land to be taken in execution of it. The question between the parties was whether the land which had been taken in execution belonged to the second defendant Anundo Chunder Doss, the case of the defendant being that he had become the proprietor of it through the deceased Rajah, the husband of the plaintiff.

The Judge in appeal, after stating the nature of the case, said that he would consider whether Brojendro, who had purchased at the auction in execution of the decree, stood in a better position than Anundo Chunder Doss, the judgment-debtor, and he held that he was not in a better position. He seems to have considered that the case was to be tried in the same way as if Anundo Chunder was the real defendant, and he held that Brojendro could not be in a better position than he was.

It is sufficient to say that we do not concur in that view. It cannot be laid down that a person who purchased at a sale by auction in execution of a decree, even although he may be the decree-holder, is not to be considered in the position of a purchaser for value. Of course, he may, from being the decree-holder, have notice of various matters which any other purchaser would not have notice of, and in that way he may stand in a different position, but the proposition which seems to have been broadly laid down by the Judge cannot, we think, be supported.

Then we have to consider what was the evidence of title which the appellant relied upon, and how he sought to show that the property belonged to the judgment-debtor. He relied upon a kobalah from the deceased Rajah. The Judge has found that it was not proved, and we must assume that there was nothing to show that such a kobalah had been executed. In fact, the only evidence in the case of a title in Anundo were representations said to have been made by the plaintiff that there had been some conveyance from the Rajah to him and that he was the owner of the property. The Counsel for the appellant relied upon them.

Unless it were shown that the defendant Brojendro Coomar Roy had acted upon those representations and was induced by them to become the purchaser, the present plaintiff, the Ranee, would not be concluded by them. If they were to be treated merely as admissions by her, and not, as we have said, as having been acted upon, it was allowable to her to show that they were not true, and therefore they did not prove a title in Anundo. The modern decisions go so far as to say that even if they had been made fraudulently, she might show what was the truth. But the Judge has found that there was no fraudulent intention in making them. He says "I find that the Ranee and Anundo conspired to represent Anundo as the purchaser of this land; it is not shown that there was any fraudulent intent in this." Therefore, we have found that the admissions which the defendant Brojendro relied upon as proving the title of his judgment-debtor were untrue, and being so they are no proof of title unless they can be regarded as conclusive and as an estoppel. It follows, therefore, that there was no evidence in the case of any title in Anundo, judgment-debtor, and the plaintiff is entitled to recover the property. The case of the defendant has altogether failed.

A question might have arisen which has not been noticed and which it is not necessary for us to determine. These are admissions by the plaintiff, the Ranee, but she is suing as guardian of her adopted son who is the real plaintiff. We do not know when he was adopted, whether before or after she made these admissions. If he was adopted before, he would not be bound by them. At the most, she would be his guardian, and the guardian of an infant has no power to bind him by admissions. If the adoption was after the representations were made, it might be a very nice question upon which we are not aware that there is any authority, what is the effect of admissions made by a person, who subsequently adopts another, in binding the person adopted, whether the person adopted can be said to derive title from the adopter in such a way as to make the admissions evidence against him. It is not necessary for us now to determine that question, for the admissions are found not to be true, and therefore are not any evidence of title at all; but if the case should arise, it may become a nice question what is the effect of representations made as we have described.

The appeal must be dismissed with costs.

The 23rd June 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Boundary—Measurement.

Case No. 115 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 30th September 1872; modifying a decision of the Moonsiff of Ghattal, dated the 23rd January 1872.

Esan Chunder Ghose and others (Plaintiffs)
Appellants,

versus

Protab Chunder Roy and others (Defendants)
Respondents.

Baboo Taruck Nath Dutt for Appellants.

No one for Respondents.

The holder of a tenure is entitled to possession of all land comprised within his boundary line, even though it exceeds the quantity which was alleged by him to be comprised therein.

Jackson, J.—It seems to us that there is an error in the judgment of the Moonsiff which has not been, as it ought to have been, corrected in the judgment of the Lower Appellate Court. The Moonsiff, having found on the evidence and on the Ameen's map that the plaintiff's boundary line ran through a certain babul tree which is shown in the map, nevertheless considered that the business of the Court was only to make up to the plaintiffs the exact quantity of land ($15\frac{1}{2}$ cottahs) which they alleged was comprised within their tenure, and allowed all the land beyond the quantity sufficient to make up the $15\frac{1}{2}$ cottahs to remain with the defendant. This was an error. The plaintiffs were entitled to get possession of all land up to their boundary line wherever that ran, without reference to the quantity which the land on measurement might prove to be. The case must go back to the Lower Appellate Court in order that it may record a fresh decision on the principle stated.

The 24th June 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Review—Witnesses.

Case No. 330 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of 24-Pergunnas, dated the 29th August 1872, modifying a decision of the 2nd Moonsiff of Alipore, dated the 27th March 1872.

Banee Madhub Laha (Plaintiff) *Appellant,*

versus

Shahzada Pakaktur (Defendant)
Respondent.

Baboo Anund Chunder Ghose for Appellant.

*Baboo Mohendro Lall Mitter for
Respondent.*

Where a plaintiff who has obtained an incomplete decree applies for and obtains a review on the ground that he was entitled, upon the allegations and proofs on the record, to the full relief which he had sought, it is not open to the defendant then to cite witnesses whom he ought to have cited at the trial.

Jackson, J.—It appears to us that the decision of the Lower Appellate Court in this case is not only erroneous but mischievous in its tendency. The plaintiff sued the defendant to recover rent, and he made it a part of the relief which he asked for in the plaint

that the defendant in case of non-fulfilment within fifteen days of the decree should be ejected. The defendant was quite aware of the importance of that prayer as is shewn by the fact that with his written statement he filed a pottah purporting to be a mokururee pottah under which he alleged he held the land. At the trial he omitted to cite any witness to prove this pottah. The arrears of rent, however, being proved, a decree was in the first place given to the plaintiff only for the rent. The plaintiff thereupon applied for a review on the ground that no order had been made in respect of his prayer for ejectment. The defendant, it seems, then made a further application that he should be allowed to call witnesses to prove his pottah, but the Moonsiff held that he was not entitled to have any further witnesses examined, and he also declared that inasmuch as the plaintiff asked for ejectment of the defendant on default of payment, and inasmuch as the defendant had omitted to prove that he was exempt from liability to ejectment, his first decision was incomplete, and he therefore added an order for ejectment of the defendant.

The case coming on appeal before the Subordinate Judge, he observes:—"It appears that the objection is a good one. The Lower Court did not allow the appellant time to prove the pottah filed by him. The declaration in review therefore that 'his tenure was not mowrosee was bad;' and he sets aside that portion of the judgment of the Lower Court. The plaintiff's case before the Moonsiff when he applied for the review was that he was entitled, upon the allegations and proofs on the record, to the full relief which he had asked. It was not open to the defendant then to repair his laches by citing witnesses whom he ought to have called and might have called at the trial. We think it is most unfortunate that the Subordinate Judge in reversing the judgment of the first Court should have so unsettled the proper procedure of the latter. It is most essential that parties should know that the time for producing evidence is the day appointed for the trial, and any further step which an Appellate Court takes leading away from that conviction is a step towards error. We think the judgment of the Lower Appellate Court must be set aside and that of the Moonsiff restored with costs. We are informed that since the order made in review, the rent due from the defendant has been paid. Of course, therefore, nothing further will come out of the order made for the ejectment of the defendant.

The 24th June 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Arbitration Award—Jurisdiction—Act VIII of 1859 s. 325.

Case No. 322 of 1873.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 18th September 1872, affirming a decision of the Sudder Moonsiff of that district, dated the 29th December 1872.

Surboree Kant Bhattacharjee (one of the Defendants) *Appellant,*

versus

Anadya Kant Bhattacharjee (Plaintiff) *Respondent.*

Baboo Huree Mohun Chuckerbutty
for Appellant.

Baboos Hem Chunder Banerjee and Doorga Mohun Doss for Respondent.

A suit having been referred to the arbitration of three persons, the arbitrators took up some only of the issues framed and determined the two matters in issue between the parties, two of the arbitrators subjoining to the award a suggestion in respect of the questions determined by them. The Moonsiff gave a decree in accordance with the award, dealing with the suggestion as surplusage. He then refused a review, and the Appellate Court considered itself precluded by s. 325 of the Code of Civil Procedure from disturbing the decision:

HELD that the Moonsiff's decision was final, and the Judge had no authority to interfere.

Jackson, J.—THE suit before the Moonsiff related to two items claimed by the plaintiff, one being a piece of land which he claimed as his own, and the other a right of way which he asserted over the defendant's land. It appears that seven issues were fixed in the Moonsiff's Court for the determination of these questions. The parties then agreed to refer the matter to arbitration, and the suit was accordingly referred to three arbitrators. What is material to be noted here is that the arbitrators in coming to an award took up specifically some of the issues framed in the Moonsiff's Court, and declined to enter into the others. But they determined the two matters in issue between the parties, and having so determined them, and the award having been signed by all the three arbitrators, two of them appear

to have subjoined a suggestion in respect of the questions which had been determined by them, to the effect that if the defendant would construct a certain *pucka* drain, the necessity for carrying out the award might not arise, as the plaintiff would then suffer no injury. The Moonsiff on receiving this award dealt with the suggestion so added as surplusage, and he gave the plaintiff a decree in accordance with the award signed by the three arbitrators. The defendant appealed to the District Court, after having first unsuccessfully applied to the Moonsiff for a review of his judgment. In appeal, he contended that the award was not a legal award, and he sought to have the decree of the Court below set aside. The Judge found that the decree was in accordance with the award, and he considered himself precluded by the terms of Section 325 of the Civil Procedure Code from disturbing the decision of the Court below.

It is contended here in special appeal that the award was incomplete, because the seventh issue was not decided, and also that the decree is not in accordance with the award because it does not embody the final suggestion of two out of the three arbitrators. Now by Section 325 it is provided:—
“If the Court shall not see cause to remit the award or any of the matters referred to arbitration for reconsideration in the manner aforesaid, and if no application shall have been made to set aside the award, or if the Court shall have refused such application, the Court shall proceed to pass judgment according to the award, or according to its own opinion on the special case if the award shall have been submitted to it in the form of a special case; and upon the judgment which shall be so given, decree shall follow and shall be carried into execution in the same manner as other decrees of the Court. In every case in which judgment shall be given according to the award, the judgment shall be final.” It is therefore the Court of first instance which determines—and it has full discretion in the matter—whether it will or not remit the award for reconsideration or set aside the award for any of the reasons stated in Section 324; and if it shall not see cause so to do, it shall proceed to pass judgment according to the award; and where it has so passed judgment, the judgment is final. It seems to us in this case that not merely did the Moonsiff refuse to remit or to set aside the award, but it did so for very good reasons. That being so,

the judgment is in every sense final, and the District Judge was quite right in holding that he had no authority to interfere with that judgment in appeal.

The special appeal is dismissed with costs.

The 26th June 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Howladaree Tenure—Possession—Limitation.

Case No. 358 of 1873.

Special Appeal from a decision passed by the Judge of Jessore, dated the 29th August 1872, reversing a decision of the Subordinate Judge of that district, dated the 11th December 1871.

Probhat Chunder Bhattacharjee (Defendant)
Appellant,

versus

Taruck Chunder Chuckerbutty (Plaintiff)
Respondent.

Baboo Doorga Mohun Doss for
Appellant.

Baboo Sreenath Doss for Respondent.

Plaintiff sued for declaration of right and confirmation of possession as tenant of the zemindar of K, defendant claiming under a howladaree lease from the zemindar of another estate, and also pleading limitation and denying plaintiff's possession. The first Court held that limitation did not apply but dismissed the suit. The Lower Appellate Court found plaintiff's documents proved, and, without going into the question of possession, gave plaintiff a decree on the ground that, as the parties represented the rights of their respective landlords and as plaintiff's landlord had obtained a decree against defendant's landlord and had been put into possession within twelve years before the commencement of the suit, limitation did not arise:

Held that, as the howladar defendant had not been a party to the suit, he could not be affected by the decree against the zemindar; but that, if it could be shown that plaintiff's zemindar, and through him the plaintiff, had been in possession within twelve years, the suit would be in time.

Jackson, J.—We consider the judgments of the Courts below in this case are erroneous upon the question of limitation. The plaintiff stated in his plaint that he was tenant under the zemindar of Kochooboonia, and was dispossessed in the year 1265 by the defendant who claimed under the zemindar of another estate, and he alleged that a suit was afterwards commenced and

carried to a decree by his own landlord against the landlord of the defendant, and he was therefore entitled by virtue of a pottah and a likhun granted by his landlord to a declaration of his right and confirmation of his possession.

The defendant claimed under a howladaree lease created in 1235 and said he had purchased the howlah some years later in 1257. He also pleaded limitation, and denied that the plaintiff was in possession before the commencement of the suit. He further disputed the documents on which the plaintiff relied.

The Subordinate Judge held that limitation did not apply, but considering that the plaintiff had not been in possession and that he had not made out the documents on which he relied, he dismissed the plaintiff's suit.

On appeal, the District Judge affirmed the decision of the Court below as to limitation, but reversed the finding as to the genuineness of the plaintiff's documents; and without going into the question whether the plaintiff proved his possession or no, gave him a decree.

It is contended in special appeal that the Courts below are both in error on the point of limitation, and also that the plaintiff could not have a decree without proving his previous possession. The Judge simply affirms the judgment of the Court of first instance on the question of limitation. That judgment is based on the ground that as the plaintiff and the defendant respectively represented the titles of their several landlords, and as the plaintiff's landlord obtained a decree against the defendant's landlord and had been put into possession within twelve years of the suit, limitation did not arise. It appears, however, that the defendant, who had purchased the rights of the howladar created in 1235, was not a party to the suit in question; and as by the creation of that howladaree tenure, the zemindar had assigned all his rights to the land except that of receipt of rent from the howladar, the howladar could not be affected by that judgment unless he were a party. But if it can be shown that the plaintiff's landlord, and through him the plaintiff, had been in actual possession within twelve years of the institution of this suit the plaintiff would be in time. For this reason it was clearly necessary that the Judge should go into the question of possession

which he has omitted to do. The case must, therefore, go back to the Lower Appellate Court in order that the question of possession, which was decided against the plaintiff by the Subordinate Judge, should be decided by the Lower Appellate Court.

The 26th June 1873.

Present :

The Hon'ble Louis S. Jackson and
Dwarkanath Mitter, *Judges*.

Collector—Deposit—Onus Probandi.

Case No. 362 of 1873.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 14th August 1872, reversing a decision of the Officiating Subordinate Judge of that district, dated the 29th January 1872.

The Collector of Moorshedabad on behalf of
Government (Defendant) *Appellant*,

versus

Thakoor Doss Shaha and others (Plaintiffs)
Respondents.

Baboo Unnoda Pershad Banerjee for
Appellant.

Baboo Gooroo Doss Banerjee for
Respondents.

A Collector cannot extricate himself from the burden of proving his claim to property in his custody by illegally seizing such property.

Jackson, J.—We think in this case the Judge has properly laid it upon the Collector, who was the defendant in the case, to show that he had any just claim upon the plaintiffs in respect of the money which he levied from them by seizing upon the deposit which was in his hand and by attaching or threatening to attach their dwelling-house. We are sorry to find it argued by the Government pleader before us that the Collector, by taking the law into his own hands and acting upon his own views as to what was due from the plaintiff, had by these summary proceedings extricated himself from the burden of proving anything and placed it on the plaintiffs to prove their non-liability.

We do not agree in the observations contained in the concluding part of the

Judge's decision where he speaks of the amount recoverable in consequence of the stamp which the security-bond bore. That question does not appear to arise in the present case.

The appeal is dismissed with costs.

The 28th June 1873.

Present :

The Hon'ble J. B. Phear, *Judge*.

Lessor and Lessee—Buildings.

Case No. 1545 of 1872.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 9th August 1872, reversing a decision of the Moonsiff of Serampore, dated the 7th July 1871.

Nobin Chunder Moordafarash (Defendant)
Appellant,

versus

Ram Narain Mitter (Plaintiff) *Respondent*.

Baboos Sham Lall Mitter and Mohendro Lall Mitter for *Appellant*.

Baboos Gopal Lall Mitter and Bhowanee Churn Dutt for *Respondent*.

Where a lessee began the construction of a house and continued to carry it on after having received notice to quit:

Held that the lessor was not bound to pay for the value of the property notwithstanding a covenant in the lease that the lessee could not be ejected without payment by the lessor of the value of property put by the lessee upon the land.

Phear, J.—No good ground of special appeal appears to me to have been made out. The learned pleader for the appellant has very frankly said that the chief ground on which he relies is the proposition that his client cannot rightly be ejected by the plaintiff excepting upon payment of the value of the property which has been put by him upon the land. And, no doubt, it does appear that in the pottah there is a covenant to that effect. But Baboo Gopal Lall for the respondent has stated that it is alleged in the plaint itself, and nowhere denied by the defendant, that at the time when the notice to quit was given, there was no house erected upon the land, and that the defendant began the construction of the house and continued to carry it on after having received the notice

to quit which is the foundation of this suit, and during the proceedings of this suit.

This being so, I think that a building constructed under those circumstances does not fall within the meaning of the covenant in the lease. It could not have been intended that the lessee while resisting lawful ejectment should be allowed to create a property upon the land for which his lessor would have to pay. This ground of appeal in my judgment fails, and I think that the appeal must be dismissed with costs.

The 30th June 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

Suit for Possession—Intervention.

Case No. 1486 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 20th August 1872, affirming a decision of the Moonsiff of Bajetpore, dated the 23rd December 1870.

Kala Chand Gungopadhya and others
(Plaintiffs) Appellants,

versus

Gunga Gobind Roy and others (Defendants)
Respondents.

Bqboo Rash Beharee Ghose for Appellants.

No one for Respondents.

In a suit to recover an 8 annas share of a talook which plaintiffs had purchased from J and S, the widow (D) of the brother of J and S, intervened claiming one-third share:

Held that D ought not to have been permitted to intervene as she had not been originally made a party, and could not be prejudiced by the decision, as by

her own admission she had parted with her interest to a third party and had stood by and allowed S and J. previous to the purchase, to obtain a settlement with Government excluding her from any share.

Kemp, J.—In this case the plaintiffs are the special appellants. They sued to recover an 8 annas share of a talook which they purchased from Joy Narain and Soorjo Narain in the year 1255. The original defendants in the suit were the zemindars who purchased the rights and interests of Government in the khas mehal Pergunnah Bulda Khat. As between the plaintiffs and themselves the zemindars pleaded; first, that inasmuch as the Government were the purchasers of the Pergunnah at a sale for arrears of Government revenue, that sale destroyed all intermediate tenures, and therefore the rights of the talookdars having lapsed by that sale, the plaintiff's vendors had no right to convey; secondly, they pleaded that the question had been decided between the parties by the Collector.

In the course of the case, Doollubba intervened. She claimed a one-third share in the talook, alleging that Nehal, who was the original proprietor, had three sons, Ram Manicko, Joy Narain, and Soorjo Narain, and that under the Hindoo law she being the widow of Ram Manicko, who died subsequently to Nehal, was entitled to a one-third share, and therefore the brothers of her husband who had already sold a 7 annas share had only 3 annas 13 gundahs 1 cowree 1 krant which they could convey to the plaintiffs.

Both Courts have overruled the objections of the zemindars, and we think rightly so inasmuch as the Government whose rights and interests the zemindars represent admitted the title of the heirs of Nehal to the talook by registration of their names.

Now comes the question of Doollubba. Both Courts have found that Ram Manicko, the husband of Doollubba, died after his father Nehal, and that Doollubba was entitled to a one-third share in the talook, and they also found that 7 annas had already been conveyed by the plaintiff's vendors to other parties, and therefore that there remained only a 3 annas 13 gundahs 1 cowree 1 krant share which could be conveyed by them to the plaintiffs. A decree was therefore given to that extent, the suit for possession of 8 annas was dismissed, and the claim for

possession modified and decreed to the extent of a 3 annas 13 gundahs 1 cowree 1 krant share.

The grounds taken in special appeal are somewhat numerous, but the main grounds are that Doollubba ought not to have been allowed to intervene in the case inasmuch as she stated in her written statement that she had parted with her interest in the talook; that the question of limitation had not been decided; that, inasmuch as before the purchase of the plaintiffs, the names of their vendors Joy Narain and Soorjo Narain only appeared in the settlement proceedings, and as the plaintiffs were *bonâ fide* purchasers from Joy Narain and Soorjo Narain, who were at the time of the purchase the recorded proprietors, the Courts below were wrong under the circumstances in not giving the plaintiffs a decree for the whole 8 annas.

We think that in this case Doollubba ought not to have been permitted to intervene in the suit. Her title was adverse both to the plaintiffs in the suit and to the zemindars defendants. She was not originally made a party, and her title could not be in any way prejudiced by any decision that might have been passed in the case; and further by her own admission, it appears that she has parted with her interest in the one-third share in the talook to a third party. There is also the fact that the settlement was made with Joy Narain and Soorjo Narain by Government, and this took place previous to the purchase of the plaintiffs, so that at the time the plaintiffs purchased, Joy Narain and Soorjo Narain were alone registered as the parties with whom Government had come to a settlement. It is therefore clear that Doollubba stood by and allowed Soorjo Narain and Joy Narain to obtain a settlement excluding her from any share in that settlement, and under this state of things the plaintiffs purchased from Joy Narain and Soorjo Narain.

We, therefore, think that the plaintiffs were entitled to a decree as against the zemindars for the whole 8 annas.

We, therefore, reverse the decision of the Subordinate Judge but without prejudice to the title of Doollubba, if she or her representative chose to file a separate suit.

The respondent Doollubba whose intervention is rejected will pay the costs of this appeal.

The 1st July 1873.

Present :

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges*.

Lease—Sub-lessees.

Case No. 333 of 1873.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 23rd November 1872, reversing a decision of the Subordinate Judge of that district, dated the 21st December 1871.

Monindro Chunder Sircar and another
(Plaintiffs) *Appellants*,

versus

Muneerooddeen Biswas and another
(Defendants) *Respondents*.

Baboo Amarendra Nath Chatterjee for
Appellants.

Baboo Mohendro Lall Mitter for
Respondents.

Where a lessee sub-lets land, the sub-lessees can have no more right to use the land in contravention of the terms of the original lease than their lessor had.

Phear, J.—In this case of special appeal 333 of 1873 which was heard by Mr. Justice Mitter and myself two days ago, it appears that the plaintiff let a certain piece of land to Modhoo Soodun, one of the defendants. And by the terms of the lease, it was amongst other things stipulated that the lessee should not excavate a tank on the land.

Modhoo Soodun, sublet the land; and, in this way, Jummeerooddeen and Muneerooddeen became the tenants actually in occupation of the soil. They in the course of their occupation excavated a considerable space of ground; and the plaintiff brought this suit against them as well as against Modhoo Soodun, seeking to compel the defendants to restore the ground to its former condition, or in lieu thereof to obtain damages from them.

The first Court was of opinion that the acts of Jummeerooddeen and Muneerooddeen were in contravention of the terms of the lease, and granted the plaintiff the relief which he asked.

On appeal, however, the Judge was of opinion that Jummeeroodeen and Muneeroodeen, inasmuch as they were not parties to the original lease granted by the plaintiff to Modhoo Soodun, were not liable in this suit. He said that the plaintiff's remedy, if any, was against his lessee. Accordingly he dismissed the plaintiff's suit as against Jummeeroodeen and Muneeroodeen.

The plaintiff appealed specially to this Court, making the two defendants, Jummeeroodeen and Muneeroodeen, respondents, and omitting Modhoo Soodun. We have thus to treat the case as if it were originally a suit brought by the plaintiff against these two defendants alone.

It seems to us quite clear that the Judge has fallen into error. The defendants Jummeeroodeen and Muneeroodeen are not strangers trespassing upon the land, but have a right to be there, as they themselves maintain, under a lease which they have obtained from Modhoo Soodun. They cannot be ejected from the land by the plaintiff. But, on the other hand, they can have no more right to use the land in contravention of the terms of the lease than their immediate lessor Modhoo Soodun had. They are bound to know what were the terms upon which their immediate lessor had a right to hold the land. If he has concealed those terms from them to their detriment, it is possible that they may have a remedy against him. But it would be almost monstrous to hold that, because Modhoo Soodun had given over possession of the land to a sub-tenant, therefore the plaintiff would be deprived of a direct remedy against the wrong-doer.

It appears to us that if the plaintiff makes out by evidence that the acts which he charges the defendants with having committed, are acts done in breach of the stipulation which he made with his lessee Modhoo Soodun, he has a right to have the assistance of the Civil Court by way of injunction or otherwise for the purpose of getting the land restored as nearly as may be to its former condition. In other words, if the plaintiff's case is made out, the Civil Court has full jurisdiction to make the defendant level the land, or in default thereof to pay such money by way of damages to the plaintiff as will enable him to restore the land to its former condition without loss.

We, therefore, reverse the decision of the Lower Appellate Court, and send back the case to that Court for retrial upon its merits.

Costs will abide the event.

The 2nd July 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

Purchaser of Khas Mehal—Limitation.

Case No. 750 of 1872.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 22nd February 1872, modifying a decision of the Moonsiff of Nubeegunge, dated the 29th July 1870.

Hossein Buksh (Defendant) *Appellant,*

versus

Ameena Khatoon and others (Plaintiffs)
Respondents.

Baboo Bipro Doss Banerjee for Appellant.

Baboo Grish Chunder Ghose for Respondents.

A suit by the purchaser of the rights of Government in a khas mehal to obtain possession, is governed not by the limitation of 60 years, but by that of 12 years.

Kemp, J.—THIS suit was remanded by the late Justice Bayley and Justice Paul on the 24th of November 1871* for a proper trial on the question of limitation. The learned Judges observe that the only remark made by the Lower Appellate Court on this important plea is that the point is worthless. The Judge was, therefore, directed to give specific reasons for his conclusion, and to declare judicially whether on any of the above reasons, namely, the reasons alluded to in the order of remand, or on others, he holds that the plea of limitation taken by the defendant is of no force.

After the remand the Judge says:—"In my opinion, for the reasons given by the Moonsiff in his decision, the plaintiff's suit is not barred by the law of limitation, and I adhere to my former judgment."

The defendant is the special appellant before us. The plaintiff appears to have purchased the title of Government in a khas mehal originally acquired, when it is not shown, by the Government at a sale for arrears of Government revenue; and he now sues to establish his title in and obtain possession of certain lands as appertaining

* 16 W. R., 230.

to khas mehal Augur Doss, talook No. 3. The plaintiff's purchase dates from 1862.

The defendant says that these lands do not appertain to the khas mehal referred to by the plaintiff, but are resumed lands which had been settled with him by Government in 1842; that he has been in possession of these lands since 1842; and that the plaintiff's suit is therefore barred.

Both the Lower Courts have found that the plaintiff's suit was not barred, inasmuch as the plaintiff having purchased the rights of Government had sixty years within which to sue. As already stated, it has not been shown when the Government purchased the estate; but be that as it may, it is clear that both Courts were wrong in finding that the sixty years' rule applied to this suit. This is not a suit for any public right, and the twelve years' limitation clearly applies.

As to the findings on the merits, the Courts below have held that a portion of the land claimed did not belong to the khas mehal purchased by the plaintiff, but formed part of the lands settled with the defendant; and with reference to the remaining portion of the lands, that they did appertain to the plaintiff's khas mehal and had been held without right by the defendant, and that the defendant, although he pleaded adverse possession for more than twelve years, could not succeed on that plea, inasmuch as the sixty years' rule applied.

It has been said in special appeal by the pleader for the respondent that, as both Courts were wrong in applying the sixty years' rule, he has had no opportunity of proving that his client purchased, and was in possession of the disputed lands, within twelve years.

Now, as already stated, the defendant has got a portion of the land in suit decreed to him as belonging to the resumed mehal settled with him, and the plaintiff's suit was dismissed with reference to this portion of the lands. With reference to the other portion, the plaintiff had no opportunity of proving that he was in possession of these lands within twelve years. We must, therefore, remand the case to the first Court to give the plaintiff an opportunity of proving that he or the Government before him have been in possession of this portion of the lands within twelve years prior to suit. Costs to follow the result.

The 2nd July 1873.

Present :

The Hon'ble F. B. Phear, *Judge*.

Enhancement of Rent—Notice.

Case No. 1745 of 1872.

Special Appeal from a decision passed by the Judge of Sarun, dated the 25th July 1872, reversing a decision of the Moonsiff of Chumparun, dated the 3rd April 1872.

Shaikh Husmut Ali (Plaintiff) *Appellant*,

versus

Ouree Thakoor (Defendant) *Respondent*.

Moonshee Mahomed Yusoof for Appellant.

Baboo Bama Churn Banerjee for Respondent.

In a suit for arrears of rent at an enhanced rate after notice, it is incumbent upon the plaintiff to show that he gave the defendant proper and sufficient notice embracing good and legal ground of enhancement, and that the ground did in fact exist. Where the notice really serves its purpose, the suit cannot be dismissed on a mere technical objection.

Phear, J.—AFTER having taken some time to consider my judgment in this case, I have arrived at the conclusion that I ought not to disturb the decision of the Lower Appellate Court.

The plaintiff sued to recover certain arrears of rent at an enhanced rate after notice. The Judge of the Lower Appellate Court says that the only point for him to decide was whether the notice served is sufficient or not. "The objection as to the insufficiency of the notice was not taken before the Moonsiff, but has been pleaded in appeal to this Court for the first time. It is, however, a point of law which can be pleaded at any time."

And then the Judge goes on to express his opinion that the notice was insufficient, and upon that ground he reversed the decision of the Moonsiff and dismissed the plaintiff's suit.

Now, without taking precisely the ground of judgment which the Lower Appellate Court took, I think it must be conceded that it is certainly incumbent upon the plaintiff in a suit of this kind to show that he gave

the defendant proper and sufficient notice of enhancement embracing in it a good and legal ground of enhancement; and further, to prove that that ground of enhancement did in fact exist.

Now in the present case the notice of enhancement is unquestionably very confused and rambling: to say the least of it, the document is most discreditable, in my opinion, to the *serishtah* of the *Bhettia Rajah*. It contains a good deal which does not afford legal ground for enhancement; and intermingled with this, not very readily separable from it, is perhaps to be found this ground, namely, that land possessing similar advantages and adjacent to the land for which the rent is sought, does pay higher rent than that which the defendant has been paying. But even this much is stated very indistinctly; and moreover, there is an absence in the notice itself of any allegation that the land so referred to is occupied by ryots of the same *status* with the defendant.

So that the notice, as I have already said, is certainly most unsatisfactory, and is not in itself complete even upon this particular ground of enhancement. Still if it had really served its purpose, in view of the fact that the defendant never made any objection in the first Court, I do not think that the Lower Appellate Court would have been right in throwing the plaintiff over upon what in that event would have been a technical objection. And this Court upon special appeal has many times said as much. In reference to this point, it is sufficient for me to refer to a case which was determined in this very Bench only a short time ago, in special appeal No. 1054 of 1872.

But further, in the present case, when we come to look at the course of the trial in the first Court, I find that the parties appear to have been from the beginning very much at sea in this matter. Two issues were raised, and the second issue is in these terms:—

“Whether or not, with reference to the ‘productive powers of the defendant’s field’ and the rate prevailing in lands adjacent ‘to and surrounding the defendant’s holding,’ the defendant’s rent ought to be enhanced, ‘and if so, to what amount?’”

Now, obviously that is not a single issue; and the latter part of it, which ought to have been put into the form of a distinct issue by itself, is deficient in the very particular in which the notice of enhancement itself is deficient.

And further again, the *Moonsiff*’s discussion of the evidence and the conclusion at which

he arrives shows very clearly that there never was in the first Court a proper trial of the essential part of the ground of enhancement upon which the plaintiff now relies. The *Moonsiff* himself says that he experiences some difficulty, because it appears from the evidence “that there are different rates prevailing for surrounding lands of similar description with the defendant’s lands.” But he stopped short of enquiring whether those different prevailing rates were or were not due to the difference in the *status* of the rent-payers or not. So that it seems to me, from beginning to end, there has been a failure in this case to perceive and try the very question between the parties which the Court was bound to try as going to the essence of the plaintiff’s ground of enhancement. And this fact is mainly due to the incompleteness and irregularity of the original notice of enhancement.

On the whole, then, I think that the Judge of the Lower Appellate Court was right when he dismissed the plaintiff’s suit. I therefore dismiss this appeal with costs.

The 3rd July 1873.

Present:

The Hon’ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon’ble F. A. Glover, Judge.

Execution—Suit—Act XXIII of 1861 s. 11.

Case No. 1508 of 1872.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 25th June 1872, affirming a decision of the first Moonsiff of that district, dated the 28th September 1871.

Dwarkanath Samoojee (Auction-Purchaser)
Appellant,

versus

Protap Chunder Dutt and others (Plaintiffs)
Respondents.

Baboo Rash Beharee Ghose for Appellant.

Baboo Bhowanee Churn Dutt for
Respondents.

A suit having been brought against D and her son, and against the plaintiffs as heirs of D’s sister S, an *ex parte* decree was passed, after D and S had died,

against the property left by the sisters. Property was attached in execution, when plaintiffs claimed a share as having come to them not from their mother S, but from their maternal grandfather. Plaintiffs then sued the purchaser at the execution sale:

HELD that as defendant was not a party in the original suit, the case was not one to which Act XXIII of 1861 s. 11 could apply.

Couch, C.J.—THE facts of the case, as stated in the judgment of the District Judge, are that Madhub Mohun Halder died in 1251, leaving two daughters. They succeeded to his property, which included a tank called Halder's tank. Both daughters were married and had issue. One of them, Shama Soonduree Dossee, was the mother of the three plaintiffs, and the other, Doya Moyee Dossee, was the mother of the defendant Koonjo Beharee Dutt.

Shama Soonduree died in the beginning of Joisto 1276, and Doya Moyee died on the 12th of Kartick in the same year.

A suit was brought against Doya Moyee and her son Koonjo Beharee Dutt, and the plaintiffs as the heirs of Shama Soonduree Dossee, to recover Rs. 100 on a bond, and an *ex parte* decree was passed on the 12th of January 1870 after both the daughters had died. By that it was ordered that the debt should be liquidated out of the property left by Shama Soonduree and Doya Moyee. Property was attached in execution of that decree, and the plaintiffs put in a claim to a share of it on the ground that it had come to them, not from Shama Soonduree, their mother, so as to be any part of her estate in their hands, but that they had succeeded to it as heirs of their maternal grandfather.

The defendant in the present suit was the purchaser at a sale by auction in execution of the decree. It seems that one of the objections was that the plaintiffs were defendants in the former suit, and as such were barred by Section 11 of Act XXIII of 1861 from bringing this separate suit.

Both the Lower Courts have decided in favor of the plaintiffs.

It has been objected in the special appeal that the suit cannot be maintained, and that it is barred by Section 11 of Act XXIII of 1861.

That Section does not really apply to this suit. What it provides is that questions arising between the parties to the suit in which

the decree was made and relating to the execution of the decree, must be determined by the order of the Court, and not by a separate suit.

This suit is not between the parties to the suit in which the decree was made. It is between the persons who were defendants in that suit, and a new person, the purchaser at the sale. The case was argued before us as if it was a question between the parties to the original suit, although towards the end of the argument the real state of things was alluded to, namely, that the defendant was a person who had come in afterwards. The Section does not apply, and there is no ground for the objection. The case of the plaintiffs is this, that the defendant has bought property at a sale in execution of a decree which was not authorized by the decree to be sold. What the decree authorized to be sold was the property which had come from the plaintiff's mother, and they say that the property they claim in this suit was not such, but property which they had independently of her.

Another objection was taken that the plaintiffs were, as it is described, benefited by the sale, and that the money which was produced by it had been applied in payment of their creditors; and, at least, if the defendant was not to keep the property, he ought to be repaid the money which had been so applied. But this question was not raised in the first Court. No enquiry was made as to how the money was applied, and we have no facts found which would enable us to say whether this allegation is true or not. From what we read, we are inclined to think it is not exactly as it was represented to us on the part of the appellant. But the question not having been raised, and so no opportunity given to the plaintiffs to show what the facts really were, is sufficient to prevent effect being given to the objection in special appeal. Unless the facts had been properly enquired into and found by a competent authority, effect ought not to be given to such an objection in the stage in which the case comes before us.

The appeal must be dismissed with costs.

The 3rd July 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

Ameen—Bribery—Right of Action.

Case No. 82 of 1873.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 10th August 1872, reversing a decision of the Moonsiff of Hathazaree, dated the 27th May 1872.

Gogun Chunder Dutt (one of the Defendants)
Appellant,

versus

Janokee (Plaintiff) *Respondent.*

Mr. C. Gregory and Baboo Aukhil Chunder
Sen for Appellant.

Mr. H. E. Mendies for Respondent.

A civil suit does not lie to recover money paid to a Civil Court Ameen to induce him to make a favorable report.

Kemp, J.—ONE of the defendants, Gogun Chunder Dutt, a Civil Court Ameen, is the appellant in this case. He was sued with other defendants by the widow of one Kally Churn Moonshee, who, we are informed, was a pleader in the Moonsiff's Court of Futtickcherree in Zillah Chittagong, to recover back Rs. 140, which had been paid by Kally Churn to the defendant Kristo Chunder Dutt, brother of the Civil Court Ameen, as a bribe to induce the latter to report in favor of Kally Churn in a certain case which was submitted to the Ameen for report on a question as to the amount of wassilat. The Moonsiff held, and we think rightly, that the suit would not lie in the Civil Court. The Judge, while finding that there is no direct evidence that this money was paid to the Ameen, was of opinion, on the whole of the evidence, that the money was paid as alleged; and, on the point of law, the Judge, after quoting certain cases, was of opinion that this money having been extorted from the plaintiff's husband, a suit would lie for its recovery.

We think that, under the ruling to be found in Volume XVIII, Weekly Reporter, page 450, no such suit will lie in the Civil Court.

The suit of the plaintiff will, therefore, be dismissed as against the Ameen, appellant, Gogun Chunder Dutt, with costs.

The 4th July 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

Joint Liability for illegal Act—Contribution—Right of Suit.

Case No. 1659 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 25th June 1872, reversing a decision of the Sudder Moonsiff of Beaulah, dated the 3rd April 1871.

Ruthee Sirdar and others (some of the Defendants) *Appellants,*

versus

Shujoo Paramanick (Plaintiff) *Respondent.*

Baboo Gopeenath Mookerjee for Appellants.

No one for Respondent.

A zemindar having obtained a joint decree for costs against certain villagers who had been jointly concerned in opposing an Ameen who was measuring the lands of his zemindaree, executed his decree by the attachment of the property of one of the judgment-debtors. This judgment-debtor then sued the others for contribution: HELD, that the suit would not lie.

Kemp, J.—THE admitted facts in this case are, that on the zemindar Ram Tunoo Ghose attempting to measure the lands of his zemindaree, the Ameen was opposed by the plaintiff and defendants and other villagers, was driven out of the village, and was unable to make the measurement. The zemindar thereupon brought a suit against the opposing parties, and obtained a joint decree for costs. On executing this decree, it appears that the zemindar attached the property of the plaintiff alone, and recovered the whole amount of his decree from him. The plaintiff, therefore, brings this suit for contribution, after deducting from the total amount paid by him in execution the share for which he, the plaintiff, was liable.

The defendants pleaded, 1st, that the Civil Court had no jurisdiction as the suit was one triable in a Small Cause Court; 2nd, that the decision to be found in Volume VII,

Weekly Reporter, p. 384, applied; and lastly, that the defendants had paid Rs. 150 to the plaintiff.

The first Court was of opinion that the suit was cognizable by the Civil Court, but that the Full Bench ruling applied, and dismissed the suit.

On appeal, the Subordinate Judge found on the evidence that the plaintiff and defendants equally opposed the Ameen in his attempt to effect the measurement of the village; that the ruling in Volume VII did not apply; and that the plea of the defendants that they had paid Rs. 150 to the plaintiff was not established by evidence.

The ruling to be found in Volume VII refers to a case of damages; the present case not being one for damages at all, but for costs. In that case, the defendants had trespassed upon the lands of the plaintiff and erected a bandel thereon for the purpose of catching fish within the limits of the plaintiff's estate. Even in that case, which was one of trespass, the Chief Justice, who delivered the judgment of the Full Bench, says:—"The Court cannot say whether the plaintiff was entitled to contribution or not: all that we can say is that the plaintiff was not necessarily precluded from recovering contribution, merely because the damages for which the decree was given were caused by a wrong, in the legal sense of the word, done to the plaintiff. If the Judge had jurisdiction in the case, we should inform him that he ought to try the case upon the merits, and to ascertain whether, having reference to the circumstances under which the trespass was committed, the parts which the defendants respectively took in it, and the benefits, if any, which they respectively derived from it, they ought to contribute any and what portions of the damages recovered against them." The Chief Justice then goes on to say:—"If they were all jointly concerned in committing an act which they knew to be illegal, the plaintiff is not entitled to contribution."

In the case now before the Court, the parties were only jointly concerned in the act of opposing an Ameen in making a measurement, and the decree being a joint one the presumption is that the defendants in the original decree were jointly liable. The Lower Appellate Court has found on the evidence that the defendants in this case joined the plaintiff in opposing the zemindar.

We dismiss the appeal, but without costs, as no one appears for the respondent.

The 4th July 1873.

Present:

The Hon'ble Dwarkanath Mitter, Judge.

Minor—Guardian—Estoppel—Joint Owners—Remedy.

Case No. 498 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 8th December 1871, reversing a decision of the Additional Moonsiff of Naraingunge, dated the 31st May 1871.

Sreemutty Aporajita Debia (Plaintiff)
Appellant,

versus

Panchcowree Kyburto Doss (one of the
Defendants) *Respondent.*

Baboo Chunder Madhub Ghose for
Appellant.

Baboos Sreenath Banerjee and Aukhil
Chunder Sen for *Respondent.*

The fact of a minor's guardian not having instituted any proceedings to set aside a mokururee pottah is not sufficient to defeat his title, or make the terms of the pottah binding on him.

Where joint owners of land make an excavation which causes injury to their co-sharers, the remedy of the latter lies in an action either for partition or for damages.

Mitter, J.—In this case it is clear that the decision of the Subordinate Judge is erroneous, and ought therefore to be set aside. The real plaintiff in the suit was the minor, and not the lady Sreemutty Aporajita Debia, as the Subordinate Judge erroneously supposes. It is admitted on all sides that the minor is entitled to a 4-anna share of the property in dispute, and it seems to be quite clear that the mere fact of his mother and guardian not having instituted any proceedings against the defendants for a period of four years to set aside the mokururee pottah set up by them is not sufficient to defeat his title, or to make the terms of that pottah binding on him. I am of opinion, however, that the claim for filling up the excavation made by the defendants

upon the land in dispute cannot be maintained. As joint-owners of that land the defendants were just as much entitled to use it as the plaintiff, and if by making the excavation in question they have done any injury to the plaintiff, the latter must seek his remedy in an action either for partition or for damages. Under these circumstances, the decree of the Subordinate Judge must be reversed, and a decree entered for the plaintiff simply for *ijmalee* possession of the 4 annas share which belongs to him, with costs.

The 5th July 1873.

Present :

The Hon'ble E. G. Birch, Judge.

Prescriptive Right—Injurious User.

Case No. 987 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 7th May 1872, reversing a decision of the Moonsiff of Kotulpore, dated the 12th July 1871.

Sreedhur Dey (one of the Plaintiffs)
Appellant,

versus

Adoyto Kurmokar and others (Defendants)
Respondents.

Baboo Bhowanee Churn Dutt for
Appellant.

No one for Respondents.

There can be no prescriptive right to injure another, even though such injury has the warrant of very ancient user.

Birch, J.—In this case, I think that the decision of the Lower Appellate Court cannot be sustained. The Judge remarks that "very ancient user is admitted, and no injury is proved;" and it appeared to him that the suit was brought from some spite, and was groundless. The Moonsiff went to the spot, and found that the defendants have been in the habit of throwing into the plaintiff's tank the burnt earth of which their crucibles were made, and that by reason of their so doing, earth had accumulated in the bed of the tank on both sides of the

ghat near the defendant's house. The defendants have admitted in their grounds of appeal before the Judge that they had thrown this earth into the tank, and claimed a prescriptive right so to do.

There can be no prescriptive right in such a case as this, and it is quite clear that if the defendants persisted in throwing earth into the tank, the plaintiff might suffer greater injury than he has already sustained, by having the bottom of his tank raised. The Moonsiff's order was that the burnt mud thrown by the defendants into the bed of the tank should be removed by them; and this order seems to me under the circumstances to be a proper one.

The decision of the Lower Appellate Court will be reversed, and that of the Moonsiff restored. The appellant is entitled to his costs.

The 5th July 1873.

Present :

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

Execution—Limitation.

Case No. 60 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 6th December 1872, affirming an order of the Moonsiff of Jamalpore, dated the 22nd March 1872.

W. B. Manson, executor to the estate of the late K. Brodie (Decree-holder)
Appellant,

versus

Khulleet Fakheer and others (Judgment-debtors) *Respondents.*

Baboo Anund Chunder Ghossal for
Appellant.

No one for Respondents.

An execution case, after sundry attempts at satisfying the decree which were only partially successful, having been struck off by the Deputy Collector, the decree-holder did nothing for three years and three months, and then applied for execution, when, on the objection of the judgment-debtor, the Deputy Collector held the decree to be barred. On a second application, he set aside his former order. Meantime the case was transferred under Act III (B.C.) of 1870, to the Civil Court, which held that it could not interfere with the Deputy Collector's judgment on review, and on another application being

made for execution, some of the judgment-debtor's property was attached and sold:

Held that the judgment-creditor's decree was barred.

Kemp, J.—THIS is a peculiar case. The decree is dated the 19th of May 1865. Two applications were made between that date and the 14th of August 1866, but nothing appears to have resulted from these applications. On the 5th of September 1866, the judgment-debtor prayed that the property might be released from attachment, promising that he would pay Rs. 500 on that day and the balance within one month. The judgment-creditor consented to this arrangement and the property was released from attachment, but only Rs. 300 were paid then, and the balance was not paid within the month; and although the Court struck off the case on the 8th of September 1866 before the month allowed for payment had expired, the judgment-creditor actually did nothing from that date to the 8th of December 1869, so that three years and three months elapsed before any application was made.

A third application was then made on the 8th of December 1869, and on the 7th of February 1870 an order was made that, subject to any objections that might be made on the part of the judgment-debtor, the case be revived.

The judgment-debtor did object, and on the 8th of April 1870 the Deputy Collector held, and we think properly held, that the decree was barred. Subsequently, an application was made for review of judgment, and the Deputy Collector, without notice to the judgment-debtor, set aside his former order and held that the decree was not barred.

In the meantime, Act III of 1870 came into operation, and the case was transferred to the Civil Court. The judgment-debtor again applied to the Civil Court alleging that the decree was barred, but the Moonsiff held that as the Deputy Collector had ruled on review that the decree was not barred, the Civil Court could not interfere. After this, another application for execution was made, some property belonging to one of the judgment-debtors was attached and sold, and the case was struck off on the 20th of April 1870.

The last application, which we have now to deal with, was made on the 14th of August 1871. Both Courts have held that the application of the decree-holder is barred. It has been contended in special appeal, 1st, that as there was no appeal from the decision of the Deputy Collector holding that the decree was not barred, the Civil Courts were

bound by that decision, and they were wrong in holding that the decree was barred; 2nd, that under Section 8 Act III of 1870 the Civil Court had no jurisdiction whatever in the matter.

With reference to the first objection, it appears to us clear that, whatever effect the decision in review of the Deputy Collector may have had at the time it was passed, when the judgment-creditor applied in 1871 he was bound to show that his decree at that time was alive. Now it is very clear, as shown by the Courts below, and further it is admitted that but for this order of the Deputy Collector on review, the decree was barred on the 8th of December 1869. We, therefore, hold with the Courts below that the judgment-creditor's decree was barred, and that his application to enforce it must be dismissed.

On the second ground, we think that the appellant is not entitled to take this objection at all. He invoked the aid of the Civil Court and asked that Court to enforce his decree. It therefore does not lie in his mouth to take this objection, which he has moreover taken for the first time in this Court.

We dismiss the appeal but without costs, as no one appears for the respondent.

The 5th July 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

*Erroneous Action of Courts—Restitution
to Parties.*

Case No. 108 of 1873.

*Miscellaneous Appeal from an order passed
by the Judge of Patna, dated the 15th
January 1873.*

Bibee Hamida *alias* Kajoo and others, Decree-
holders (Defendants) *Appellants,*

versus

Bibee Bhudhun, Judgment-debtor (Plaintiff)
Respondent.

*Baboo Chunder Madhub Ghose and Moon-
shee Mahomed Yusoof for Appellants.*

*Messrs. R. E. Twidale and C. Gregory
for Respondent.*

A plaintiff, having sued for possession and obtained a decree, which was affirmed in appeal, entered into

possession. The mesne profits due as damages from the defendant on account of wrongful dispossession were also calculated and paid into Court. Defendant then appealed to the Privy Council, which reversed the decrees of the Lower Courts, and directed the High Court to give effect to its order and declarations in the case. No orders were made by the High Court to this end, and it became the duty of the Lower Court to frame the final decree. The Judge made an order for the restitution of the property; but not an order for repayment of the rents and profits derived therefrom by the plaintiff during his possession:

Held that the Judge should have made this order also, and that interest should be paid on the mesne profits according to the rule that parties should be restored as far as possible to the same position as they were in when the Court by its erroneous action displaced them from it.

Phear, J.—We think that in this case there has been to some extent a miscarriage of the matter in the Court below. The question which has arisen is, however, not so much a question relative to the execution of a decree which has been passed, as the question what are the proper final orders to be given in consequence of the decision of the Privy Council determining the original matter of suit between the parties.

The plaintiff sued to obtain possession of certain property; and, on the 8th March 1861, obtained a decree of the local Court for possession. On regular appeal, this Court affirmed the decision of the first Court with some slight modification; and the consequence of this was that the plaintiff was allowed to get possession of the property in execution of the first decree so far back as the early part of the year 1862. Also the mesne profits due as damages from the defendant to the plaintiff in consequence of the previous supposed wrongful dispossession of the plaintiff, were calculated and paid into Court.

But the defendant appealed against the decree of this Court to the Privy Council; and on the 22nd April 1872, the Privy Council gave a decision in favor of the defendant, directing the plaintiff's suit as to two villages to be dismissed with costs. The Privy Council came to the conclusion that the appeal and the cross-appeal ought to be allowed, and that the decrees of this Court and of the Zillah Court ought to be reversed, and that in lieu of the said decrees it should be ordered and declared by Her Majesty as was then set out in some detail by the judgment of the Privy Council; and finally the Privy Council directed "that the case be remitted to the High Court to give effect to these orders and declarations, and carry the same into execution."

It appears that no orders were specifically made by the High Court for the purpose

of giving effect to the decision and declarations of the Privy Council, although probably the successful party in the appeal to the Privy Council ought to have obtained the requisite orders from this Court. However, in the absence of such orders from this Court, the decision of the Privy Council and the record came before the Lower Court for the purpose of having that decision in favor of the defendant given effect to; and then it became the duty of the Lower Court to make the final orders which perhaps the High Court might the more properly have made in the first instance: in other words, to frame the final decree between the parties in such a way as to carry into effect the decision of the Privy Council. And it seems to us that that decree ought to contain in addition to the order dismissing the plaintiff's suit with costs (according to the direction of the Privy Council) such further orders as might be necessary for the purpose of rectifying and undoing the effect of the mistakes previously made by the Court in the proceedings. And one of those orders certainly was that not only the property which had been taken possession of by the plaintiff in execution of the decrees which were subsequently reversed should be restored to the defendant, but also that the rents and profits which had been received by the plaintiff from this property during the time he had been so in possession should be accounted for and paid over to the defendant. The Judge did make the order for the restitution of the property, but withheld the latter portion of the order.

We think that he was wrong in that respect. The order must therefore be made that the plaintiff do pay to the defendant the rents and profits which he has received from the property during the period of dispossession, and that the necessary steps be taken by the Court for the purpose of calculating them. Therefore this case will be sent back to the Lower Court for that purpose.

In coming to this decision we have followed the precedent which was quoted to us, and have also given effect to the opinion which was expressed by the late Chief Justice, although it did not amount to a judicial decision, in the Full Bench case reported in IX Weekly Reporter, page 409. We think that that precedent and that opinion are in accordance with the rule which Courts of Justice are bound, when necessary, to act upon of restoring parties, so far as they can be restored, to the same

position as they were in at the time when the Courts by its erroneous action in the course of suit displaced them from it.

As to the remaining question with regard to the right of the defendant to the interest on the money which has been ordered to be paid back to him, we think he is by the same rule entitled to such interest, and we direct that it be calculated at 6 per cent. from the time when the money was paid over to the plaintiff.

With regard to interest on the mesne profits which are to be calculated, we think that the appellant ought to have interest at 6 per cent. on those mesne profits from the time when they are ascertained until realization.

The appellant must have his costs in this Court, and we allow two gold mohurs for pleader's fees.

The 5th July 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Misjoinder of Causes—Special Appeal.

Case No. 1962 of 1872.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 4th September 1872, reversing a decision of the Moonsiff of Durbhangah, dated the 27th April 1872.

Tarinee Churn Ghosé (Plaintiff)
Appellant,

versus

Hunsman Jha and others (Defendants)
Respondents.

Baboo Chunder Madhub Ghose for
Appellant.

Messrs. J. S. Rochfort and J. Younan for
Respondents.

As a general rule, if an objection on the ground of misjoinder of causes is pressed and carried to a decision in the first Court, the High Court will, even upon

special appeal, upon its being shown to be well-founded, give the objector the benefit of it; but if it is not pressed and carried to a decision in the first Court, and if the parties go to trial and if the objection had not been made, then the objection will not be given effect to at a later stage unless it appears clearly that there was a defect in the original trial in consequence of the misjoinder.

Phear, J.—This is a suit brought by the plaintiff against three sets of defendants, defendant No. 1, defendant No. 2, and defendant No. 3, for the purpose of obtaining cultivator's possession of a 150 beegahs of land which he says he is entitled to.

The plaintiff alleges that the land was possessed by the defendant No. 2 under a *kasht mowrosee* right, and that it was sold at an auction sale to the defendant No. 1, who again afterwards sold it to the plaintiff.

The plaintiff further alleges that the defendant No. 3 being ticcadar and representative of the zemindar had, before the sale, wrongfully dispossessed the defendant No. 2 of 30 beegahs out of the whole 150, and that defendant No. 2 had brought a suit against him to recover it, and had actually obtained a decree.

According to these statements, it would appear that the plaintiff really does cover two perfectly distinct causes of action. As against the defendant No. 3, the plaintiff in substance complains that he, the plaintiff, having the rights of a ryot, defendant No. 2, has been wrongfully ejected, and has been kept out of possession of 30 beegahs of land by his zemindar, defendant No. 3.

As regards the other defendants, he says that he is kept out wrongfully by them from 120 beegahs of land without any show of right at all.

The defendant No. 3, in his written statement, pointed out the distinction between these two causes of action, and said that he ought not to be sued jointly with the other defendants. But it does not appear that at the trial he pressed the Court for an issue upon this point; and the first Court did not in fact raise any issue. The result was that the trial was had, and all parties brought their evidence before the Court just as if the cause of suit was single between the plaintiff and all the defendants.

The first Court gave the plaintiff a decree for a portion of the land as against the defendants No. 1 and No. 2; but dismissed the plaintiff's suit as against the defendant

No. 3, on the ground that it was barred, it being essentially a suit brought by a ryot to recover possession of land from which he had been illegally dispossessed by his landlord, and was therefore barred by special law of limitation prescribed by Act VIII of 1869, B.C.

On appeal, which was preferred by the plaintiff and the defendant No. 2, both appealing, the defendant No. 3 again objected to the joinder of two causes of action; and the Lower Appellate Court has dismissed the plaintiff's suit in its entirety on the ground that it is multifarious.

We have had various decisions of this Court cited on the one side and the other in support of and in adverse to the decision which the Lower Court has passed. And I think we may state as the result of these various decisions and others with which we are acquainted, that, as a general rule, if an objection on this ground is pressed and carried to a decision in the first Court, this Court will even, upon special appeal, upon its being shown to be well founded, give the objector the benefit of it. But, on the other hand, if it is not pressed and carried to a decision in the first Court, and if the parties go to trial in the same way as if the objection had not been made, then the objection will not be given effect to at a later stage, unless it appears clearly that there was a defect in the original trial in consequence of the misjoinder of the causes of action to which the objection is directed.

There are many cases in our Courts, in addition to those which were quoted to us, all of which, as far as my memory serves me, bear the same construction. This Court has always held that it is the duty of the first Court which receives the plaint and entertains the suit, to take care that the parties are not prejudiced by any unfair complication in the matters which the plaintiff charges against the defendants. But if the parties have chosen to go to trial and have not insisted upon the first Court taking a step of this kind, then it may very fairly be taken against them at a later stage of the appeal proceedings that they have not in fact suffered any material disadvantage in the trial, unless, as has been already remarked, it be distinctly shown that there was such disadvantage.

In the present case, it seems that the parties did go to trial; and it has not been said on one side or the other before us that there was the least complaint, during the

trial on the part of either of the defendants that they were in any way prejudiced by the course that was taken. As far as we know, both sets of defendants, or rather the three sets of defendants, did in fact adduce all the evidence before the Court which they were able to adduce, and completely placed their respective cases before the Court. And this being so, it seems to us that it was too late to make the objection in the Appeal Court. The Judge of the Lower Appellate Court ought to have taken the case as it came up to him, and so far only given effect to the objection as to separate the two causes of action in the trial by himself so far as he best could. And in this particular instance, it would seem that the two causes of action could be very readily placed apart and tried, the one separate from the other. If he had done so, it seems to us that he would have had no difficulty of judging the merits of each cause of action upon the evidence which was on the record. He has not done this: he has dismissed the plaintiff's suit generally upon the ground that the plaint was bad for comprising more causes of action than one against different defendants.

Under these circumstances, we think that the record must be sent back to the Lower Appellate Court for a complete trial. The Judge will, we think, experience no real difficulty in taking the two cases separately, that is to say, the cause against Mr. Gale as one case: he will try that as a suit brought by a ryot against his zemindar to establish his right to the possession of the jote from which he alleges that he has been wrongfully dispossessed. He will try the other case against the defendant No. 1 and the defendant No. 2 also upon its own separate merits.

Our order will simply be that the decree of the Lower Appellate Court be reversed, and the case remanded to that Court for retrial upon its merits.

We think that the respondent, defendant No. 3, must pay the plaintiff's costs estimated in the proportion of 30 beegahs to the total amount of 150 beegahs.

We think that the case should be treated in the Court below as two suits and two appeals.

The 7th July 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Joint Decree—Execution—Contribution.

Case No. 1120 of 1872.

*Special Appeal from a decision passed by
the Officiating Judge of Purneah, dated
the 12th April 1872, reversing a decision
of the Subordinate Judge of that
district, dated the 30th August 1871.*

Serajool Huq and others (some of the
Defendants) *Appellants,*

versus

Roy Luchmeeput Singh Bahadoor (Plaintiff)
and another (Defendant) *Respondents.*

Baboo Grish Chunder Ghose for Appellants.

*Baboos Sreenath Doss, Rash Beharee
Ghose, and Mohinee Mohun Roy for
Respondents.*

In a suit for contribution towards the amount paid by plaintiff in satisfaction of a decree which had been passed in favor of a third party jointly against plaintiff and defendant, HELD that the real question was whether, under all the circumstances which constituted the relation between the present plaintiff and defendant in respect of the decree, the claim was just and equitable. If the defendant had substantially no interest whatever in the subject of the former suit, he could not be made liable to recoup the plaintiff.

Phear, J.—THE Lower Appellate Court seems to have fallen into error in regard to the principle upon which it decided this case. From its judgment, it would seem that the Lower Appellate Court considered that it was in the situation of a Court charged with the execution of a decree, and that

consequently it had no discretion whatever in the matter before it. This unquestionably is not the true aspect of the case. The liability of the defendant in the present suit to contribute towards the amount, which the plaintiff has paid in satisfaction of the former decree, does not rest solely upon the ground that that decree was passed in favor of some third persons jointly against the present plaintiff and the present defendant. That decree no doubt created an obligation to pay as between the decree-debtor in that case and the decree-creditor; but its force went no further. In this suit for contribution the Lower Court ought to have addressed itself to the question whether or not, under all the circumstances which constituted the relation between the present plaintiff and the present defendants in respect of that decree, it was just and equitable that the present defendants or some of them should repay the plaintiff a portion of the money which he had paid in discharge of the decree made against them all jointly.

The Lower Appellate Court very plainly has not looked upon the matter in this light. It has given no attention at all to the question whether or not the present appellant stood in such a relation to the plaintiff in regard to the matter of the former suit that he might in equity be made to pay back to the plaintiff some portion of the money which was decreed against them jointly. This question will mainly depend upon the extent of the interest which the different parties had in the matter which constituted the foundation of the suit in the former case. The Subordinate Judge appears to have viewed the suit in its right aspect; and he came to the conclusion that the present appellant had substantially no interest whatever in the subject of the former claim. If this be so, he ought to be relieved of any liability to recoup the present plaintiff. And perhaps this is the simplest form of the question which remains for the Lower Appellate Court to try.

It is only necessary however for us to reverse the decision of the Lower Appellate Court and to remand the case to that Court for retrial upon its merits.

Costs will abide the event.

The 9th July 1873.

Present :

The Hon'ble Dwarkanath Mitter and E. G. Birch, *Judges.*

Enhancement of Rent—Decree prior to Act X of 1859.

Case No. 821 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 4th May 1872, reversing a decision of the Moonsiff of Muxoodpore, dated the 23rd December 1871.

Doorga Churn Chatterjee (Plaintiff)
Appellant,

versus

Doya Moyee Dossia and another (Defendants)
** Respondents.*

Baboo Doorga Mohun Doss for Appellant.

Baboos Sham Lall Mitter and Sharoda Churn Mitter for Respondents.

A decree of the late Sudder Court fixing an enhanced jumma for a certain jote, passed before the promulgation of Act X of 1859, was held not to have become ineffectual by the fact of no rents having been recovered under it.

Mitter, J.—In this case, I am of opinion that the decision of the Lower Appellate Court is erroneous in law, and ought, therefore, to be set aside.

In the first place, it is clear that the Subordinate Judge had no authority to remand the case to the Court of first instance for a fresh decision on the merits. That Court had not decided the case upon a preliminary point, nor had it excluded any evidence which the parties were, or are even now, in a position to produce. Under such circumstances, the order of remand passed by the Subordinate Judge is clearly opposed to the provisions of the 352nd Section of the Code of Civil Procedure.

In the next place, it is equally clear that the Subordinate Judge is in error in holding that the decree of the late Sudder Court, bearing date the 30th of August 1858, by which the rent payable on account of the defendant's tenure was assessed at Rs. 6,343, has become "ineffectual," because it was passed before the promulgation of Act X of 1859, and because the plaintiff has failed to show that rent has been subsequently recovered from the defendant at that rate. The precedents relied upon by the Subor-

dinate Judge have been overruled by the Judicial Committee of the Privy Council in the case reported in page 175 of the 19th Volume of the Weekly Reporter, and the parties must therefore be held to be conclusively bound by that decree, which was passed by a Court of competent jurisdiction in a suit properly framed for the purpose between their predecessors in title. It is true that the plaintiff has failed to show that rent has been subsequently realized from the defendant at the rate fixed by that decree; but this circumstance cannot affect the validity of his claim to recover at that rate, when it is clear that the defendant has not been able to prove or even to allege that a lower rate of rent was subsequently agreed upon, or that the lands in his possession are not in a condition to bear the rent fixed by the Sudder Court in 1858. The defendant cannot be permitted to hold the plaintiff's lands free of rent; and in the absence of any alteration in the position of the parties, or in the condition of the lands since the date above referred to, I feel myself bound to hold that the decree in question is a good and valid foundation for the present suit.

For the above reasons, I would uphold the decision of the Moonsiff and reverse that of the Subordinate Judge with all costs.

Birch, J.—I concur.

The 9th July 1873.

Present :

The Hon'ble J. B. Phenar and G. G. Morris,
Judges.

Boundary Dispute—Survey Map—Settlement Proceedings.

Case No. 1324 of 1872.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 27th May 1872, affirming a decision of the Subordinate Judge of that district, dated the 24th July 1871.

Ranee Radha Chowdhraia (Plaintiff)
Appellant,

versus

Gireedharee Sahoo (Defendant) *Respondent.*

Baboos Romesh Chunder Mitter and Rash Beharee Ghose for Appellant.

Baboo Taruck Nath Dutt for Respondent.

In a boundary dispute, where the question relates to the situation of the pillars which formed the line, and

the sketch map left by the officer who laid down the pillars affords room for ambiguity as to the direction of the line, it is of importance to see what has been the conduct of the parties since the line of pillars was decreed to be the boundary. If there has been a Government survey, the survey map must be taken as evidence; and if one of the parties has made a settlement according to the survey boundary, the fact must be taken into account unless explained away.

Phear, J.—THE question before the Lower Courts was a very simple question of fact: and it is thus stated by the Lower Appellate Court:—

“The question this Court has to decide is “where were the pillars which formed the “boundary up to which the defendant’s “possession was confirmed in 1863.”

These pillars were set down by a darogah, who was commissioned for the purpose, in order that they might serve as a permanent demarcation of the boundary between the two estates. For some reason or other they disappeared, and the question which the Courts have had to decide is where were the pillars situated which the darogah put down in 1855.

The darogah himself has left us evidence of this line of pillars in the shape of a sketch map, in which the distances between the pillars are accurately stated. But no statement is made relative to the directions of the lines joining the successive pillars; but the parties are agreed that the darogah placed the pillars so nearly as he could upon the line of boundary given in the thakbust map of 1842. And in that map both elements are given: the element of distance and the element of direction.

In this suit the starting point of the darogah’s line is agreed to be a certain *siris* tree, and that tree appears both on the darogah’s map and on the thakbust map of 1842. But it is plain on the face of those maps that the darogah’s line did not start immediately from the foot of that tree. At that time the river Ganges passed close to the tree, and the darogah began his demarcation on the opposite side. In his map he represents his starting point to be at some slight distance to the west of the *siris* tree on the opposite bank.

In the thakbust map the line of boundary is carried across or traverses the river. But that line is apparently still more to the west of the *siris* tree than is the point of departure of the darogah’s line. The first point at which the darogah, after leaving the bank of the river, placed a pillar appears from both maps to lie in a direction very nearly due north from his starting point.

So that if it be agreed, as the parties here have agreed, that the line of boundary is to commence from the foot of the *siris* tree, the line joining the foot of the *siris* tree and the darogah’s first pillar will have an inclination towards the west. It certainly cannot, as far as we can judge from this evidence, run due north from the foot of the *siris* tree. The river has disappeared since the time when the pillars were put down, and that of course is the main reason why the parties are now prepared to start from the foot of the *siris* tree.

This being the state of the case,—that is, the original evidence affording room for some degree of ambiguity as to the precise position of the first part of the darogah’s line,—it is very important in determining the question which is before the Court to see what has been the conduct of the parties since 1855, or rather since 1863, in which the darogah’s line of posts was decreed to be the boundary line between the properties. And we then find that in 1868 there was a fresh Government survey of the ground made; and this survey must have been, in ordinary course, so far effected in the presence of the parties that the preliminary thak proceedings must at any rate have been taken either in their presence, or under such circumstances as afforded the parties the opportunity of being present. If the survey was effected in due course, it could not have taken place without notice to both parties; and consequently, unless there is evidence before the Court (and there is not) something to show that the proceedings of this survey ought not to be presumed to have been rightly carried out, this survey map certainly must be taken as evidence between the parties for as much as it is worth: it must be evidence as to possession of the parties in 1868 at the time when the survey was made. And therefore it is some evidence as to the line which has been accepted by the parties themselves as the true line of boundary between the two properties.

It seems further that the defendant has lately taken a settlement of his estate from Government by the boundary which appears in the survey map of 1868. This, no doubt, unless explained, is some evidence that he considered that to be the boundary of the estate. It is quite possible that there may be evidence on the record to show that he did not, by taking the settlement according to those boundaries, in any way intend to acknowledge that the estate did not go beyond the boundary; or there may be evidence to

show that since he took that settlement he has discovered that the proper boundary of his estate lay on the further side of it. But without some such matter of explanation as this, it seems to us that the fact of his taking that settlement according to those boundaries, is some evidence against him that he considered at that time that those were the boundaries of his estate. Of course, it is for the Court which is called upon to consider this evidence to say how much it is worth.

We find upon reading the judgment of the Lower Appellate Court that the Judge was of opinion that neither the survey map of 1868, nor the act of the defendant in taking the settlement which has been just referred to, could be any evidence between the parties in this suit, and therefore it appears that the Judge put them on one side and deliberately discarded them from his consideration. In doing this, it seems to us that he was in error: he ought, under the circumstances of this case, to have looked at these two items of evidence also, at the darogah's map and the thakbust map, and upon a view of the whole to have come to the best conclusion he could with regard to the question which was before the Court.

With these views, we think that we must reverse the decision of the Lower Appellate Court, and send the case back to it for retrial of the question where the line of the darogah's pillars lies upon the foundation of the evidence to which reference has been made.

Costs will abide the event.

The 9th July 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Absent Witnesses—Adjournment.

Case No. 1331 of 1872.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 29th May 1872, affirming a decision of the Officiating Subordinate Judge of that district, dated the 5th August 1871.

Heera Lall Seal and others (Plaintiffs)
Appellants,

versus

Mahomed Buksh Khan and others
(Defendants) *Respondents.*

Mr. R. T. Allan and Baboo Ashootosh Dhur for Appellants.

Baboos Romesh Chunder Mitter, Gocool Chunder Banerjee, Rama Churn Banerjee, and Boodh Sen Singh for Respondents.

In a case in which plaintiffs went to trial, and after nearly all the other witnesses had given their testimony, told the Court that their principal witness K had not been summoned, because he was keeping out of the way, although they had had ample time to ensure his attendance :

Held that, as plaintiffs did not state any definite facts from which the Court might judge whether or not K was evading service, and as their application was not verified by oath or solemn affirmation, the Court would not be justified in postponing the trial for the production of this witness.

Phear, J.—We think that we ought not to interfere in this case with the decision of the Lower Appellate Court.

The plaintiff sues to recover possession of certain land from various defendants several in number. He alleges that this land, together with other property, was let to Messrs. Gisborne and Co. in the year 1257 for a term of years which would expire in 1274. And further that, on the expiration of this lease, he found that the land which is the subject of suit had been taken possession of by the different defendants in the month of Choit 1271, that is, three years before, by collusion with the amlah of Messrs. Gisborne and Co.

The trial which was had in the first Court was held on the 29th and on the following days of August 1870. The Judge of the Lower Appellate Court is of opinion that the evidence on the record does not establish the fact that Messrs. Gisborne and Co. had possession of this land at any time during their lease. If they had not, then it is obvious that the plaintiff's cause of action must have accrued either to him or to his predecessor so far back as the year 1255, that is, 20 years before suit. Consequently, the Judge having arrived at the conclusion that the plaintiff had failed to prove that his cause of action accrued during the tenancy of Messrs. Gisborne and Co., very rightly dismissed the suit as being barred by limitation.

Against that decision this appeal is preferred. No objection is made to the finding of fact which was arrived at by the Judge. The objection upon which the appeal is based is that a certain witness, namely, Kunt Lall, failed to appear at the

trial when he was called upon; and that when the plaintiff asked that the trial should be postponed and measures taken in order, to secure the attendance of this witness, the first Court wrongly refused to give him that assistance.

This objection was made in the Lower Appellate Court, and overruled by the Judge in these words:—"The plaintiff urges now that this man, together with all his papers, as also Mr. Graham, the manager, should be summoned. I cannot however see the justice of this. If the plaintiff had really believed his own statement that Baboopoorn had been let by him to the factory, and if he knew that they were in possession, he would have naturally rested his whole case on the collection papers and other evidence which the factory, as his late tenants, would have been able to produce."

Substantially the Judge's remark amounts to this, that, according to the representations of the plaintiffs themselves, this man, Kunt Lall, is not the best evidence which they could and ought to adduce for their purpose. They now say that they want him to be compelled to attend in order that he may bring the jumma-bundee papers and other collection papers of the factory. The proper person to bring those would have been the manager of the factory himself. We have been told during the argument on this special appeal that the manager of the factory at that time was not on the spot. It does not appear to be manifested by the evidence in the case whether that was the fact or not. But however this may be, it does not seem to be of very much importance at present for this reason, the *ism-nuvisse* in which Kunt Lall's name was entered was filed on the 14th January 1870, and in that the plaintiff does not say that he wants him to produce the papers of the factory or any other papers whatever. Summons was issued for this man, and the nazir of the Court, in due course, within a week or so after the 14th January, returns that the summons has not been served upon him because he could not be found. Thus the witness was *not* in fact summoned to attend at the trial. And the plaintiffs had so early as the latter end of January, or the middle of February 1870, full means of knowing that this witness, who they now say is their principal and most important witness, and whom they desire to bring the papers of the factory, could not be found. The trial did not come on until August. In the meanwhile they had ample time either to find this witness and to

summon him, or to take measures to ensure his attendance at the trial: or again, in the alternative, to do that which the Judge suggested they should have done at the first if they wanted the papers of the factory,—summon some one who was in charge of the factory to produce them. But they did nothing of the kind; and they went to trial; and it was not until all the other witnesses, or nearly all the other witnesses whom they had in readiness, had given their testimony that they told the Court that Kunt Lall had not been summoned because he was keeping out of the way to avoid service. It can be scarcely said that this was entirely honest: for anything that appears now, or anything that has been stated at all in the course of the case, the plaintiffs knew nothing more at that time than the bare fact that Kunt Lall was not summoned eight months before the trial, because at that time he could not be found. It does not appear that they had any knowledge whatever as to where he was in August, the time when they made this application; and they apparently had no justification whatever for saying that he was keeping out of the way for the purpose of avoiding service.

It is to be observed also that, in the application which they make for this purpose, they do not state any definite facts from which the Court might judge whether or not Kunt Lall was evading service of the summons; and the application itself is not verified by oath or solemn affirmation.

On the whole, it seems that they laid no foundation such as would justify the Court, after the plaintiff's case had been in substance ended, in postponing the trial for the production of this witness.

In this view, we certainly should not be justified in saying that the Lower Courts have fallen into error in the course which they took.

It appears further from a consideration of the plaint itself that the cause of action is of such a character as ought to induce the Court to scrutinize very jealously the manner in which it was sought to be established. Several persons who apparently are independent of one another are jointly charged with having fraudulently taken possession of the property by collusion with the servants of his lessee on a particular day. This fact, of course, if it is made out, constitutes exceedingly good cause of action. But it is of such a nature that it ought not to be considered established by a Court of justice and equity, unless the evidence adduced in

support of it is most complete and satisfactory. From the judgment of the first Court, which dealt with the whole of the evidence, it does not appear that the plaintiffs adduced any substantial evidence at all to support a cause of action of this nature. Even for that reason alone they do not deserve the assistance of this Court to enable them to try the matter over again.

We think that the appeal must be dismissed with costs.

All those defendants who appeared by separate vakeels, under separate vakalut-namahs, are entitled to separate costs.

The 9th July 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Impartible Property—Family Custom.

Case No. 89 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 14th March 1872.

Mussamat Natukhee Kooeree (Defendant)
Appellant,

versus

Chowdhry Chintamun Singh (Plaintiff)
Respondent.

The Advocate-General and Mr. J. T. Woodroffe, and Baboo Sreenath Doss, Unmoda Pershad Banerjee, and Mohesh Chunder Chowdhry for Appellant.

Mr. C. Gregory and Baboo Romesh Chunder Mitter for Respondent.

Plaintiff sued to obtain possession of an entire Talooka (Gungore) and certain shares of other property termed the Purmessur property, all of which defendant got from her late husband R, plaintiff's case being that Gungore was the property of a joint family governed by the Mitakshara law, of which he and R were members; that by virtue of a custom prevalent in the family, the property was impartible, and was held by R as the eldest member; and that, on R's death, he became the eldest member and was entitled to the enjoyment of the property. The remaining property he said was acquired by R from the proceeds of G, and for that reason ought to go with G.

The Court found that both plaintiff and R were descended from a common ancestor M; but that, on

more than one occasion, there occurred something of a partition of the family property, the last of which partitions took place in 1832, when three persons G, RD, and S entered into an agreement under which Talooka Gungore was set apart by the contracting parties and allotted to G as his separate property. That, on the death of G, RD sued his widow and sons for a moiety of Gungore, but afterwards compromised the suit, and on condition of retaining 100 beegahs of the talooka relinquished all interest in the rest.

Held that the custom spoken of as a custom of the family in respect of this talooka was never a custom in derogation of the law of the land, but merely the usage of the family,—that which the family were accustomed to do from generation to generation in respect of this talooka, and that the allotment to G was not merely the result of the custom, but also in accordance with the desire of the father: and that Talooka G, as well as the Purmessur property, was the separate property of R. As no custom restrictive of the widow's right to succeed her husband had been proved, plaintiff's claim was inadmissible.

Phear, J.—THE plaintiff sues the defendant to obtain from her the possession of certain property, namely, the entire Talooka Gungore, and certain shares of certain other property termed in the course of the argument the Purmessurpore property, all of which she got from her late husband Runjeet Singh.

The substance of the plaintiff's case may be stated very shortly. As to Gungore he says, that this talooka was the property of a joint family, which is governed by the Mitakshara law, and of which he and Runjeet Singh, the defendant's late husband, were members; that, by virtue of a custom prevalent in the family, this property was impartible, and was held and enjoyed by Runjeet Singh as the eldest member of the family; that, on Runjeet Singh's death, he, the plaintiff, became the eldest member of the family, and so, by virtue of the custom, was entitled to have the enjoyment of the property.

As to the remaining property he says, that it was acquired by Runjeet Singh with savings effected out of the proceeds of Gungore during the period of his incumbency of it, and for that reason ought to go with Gungore.

The plaintiff also somewhat faintly says at the end of his plaint that, inasmuch as Runjeet Singh died without male issue, and the defendant is prohibited by family custom from succeeding to the property, the plaintiff is entitled at all events to take the whole of the property Gungore and the rest as Runjeet Singh's collateral heir.

Thus, in both branches of his claim, the plaintiff depends entirely upon a family custom restrictive of the law of the land. I may add that it is certain that if the custom be out of the way, and if the property, which is the property in suit, be joint family

property, immediately enjoyable by all the existing members of the family, then in that case it has been so long separately enjoyed by Runjeet Singh and his predecessors that the plaintiff is barred by lapse of time from bringing a suit to recover his share in it.

I need hardly say that it is incumbent upon a party to a suit who relies upon a custom as overriding the general law to specify that custom distinctly, and to establish it without any reasonable doubt. But if we direct our attention first to what I may term the second custom upon which the plaintiff relies, we perceive that it is nowhere distinctly stated in the plaint. It is not given in express words. We are left to guess what the plaintiff means in regard to this when he says:—"Inasmuch as Chowdhry Runjeet Singh died without issue male, the defendant, pursuant to the Mitakshara shaster and the ancient family usage, has no right whatever in the presence of your petitioner to succeed to the estate and take possession of the talooka and mouzah in suit; what she is entitled to is simply maintenance; nor is she competent to execute deed or to raise loan."

Nothing can well be much more vague and indefinite than this in the shape of an allegation of a family custom. I take the effect of it to be that, in the family to which the plaintiff says that he and Runjeet Singh belonged, there is a custom which operates to prevent all females from taking and enjoying any portion of the family property, even to the extent of creating an inability to take that which was the separate property of a deceased husband. Unless this passage go so far as this, it does not seem to afford a basis upon which the plaintiff can claim the separate property of Runjeet Singh. But if it does go so far as this, I doubt very much indeed whether it is not a bad custom such as could not be established by the strength of any evidence whatever; but whether this be so or not, there certainly is no evidence in this case tending to establish any custom of the kind, to whatever extent such custom may be supposed to go. The first Court indeed has found upon the facts that there is nothing to prevent the defendant from taking her husband's separate property. And against this finding the plaintiff has not appealed.

Then, next as to the custom upon the footing of which the plaintiff claims the Talooka Gungore, it does not seem that we have much concern with it. For assuming that this talooka was, as both sides seem to agree it was, at one time, by the operation of

the family custom impartible joint family property, and assuming also for the moment that it possibly was so at the time of the death of Runjeet Singh, the first question which arises is—Was the plaintiff at the time of Runjeet's death joint with Runjeet in respect of this impartible property, and therefore at that time in the enjoyment of it, so far as there can be any enjoyment of impartible property by other members of the joint family than the particular member who is entitled by the custom to hold the property and to receive the rents and profits?

With regard to this question, it appears in the first place (a fact which goes a certain extent in plaintiff's favor) that both he and Runjeet Singh are descended from a common ancestor Munyar Singh, who admittedly, as both parties say, was at one time the possessor of this property. This being so, no doubt the general rule comes into play, namely, that the joint condition, both of the family and of the enjoyment of the property, will be presumed to continue until it is shown in some way to have ceased. But then, on the other hand, it is plain from the admitted facts of the case that on more than one occasion there occurred something like a partition of the family property among the members of the family, including this particular property now in question: the last of these partitions or settlements having taken place in 1832.

In that year, three persons, apparently all the persons then alive who were descended from Munyar Singh, took part in a transaction which was undoubtedly a partition of the family property to some extent. And the only disputable point with regard to it is whether Gungore was affected by the dealings of those parties *inter se*, or whether it was entirely left out of consideration by them. These persons were Gurdial Singh, Ramdial Singh, and Sooman Singh. And it appears to me that the question which we have to consider at this stage may be conveniently put into the shape—Did that which took place between Gurdial Singh, Ramdial Singh, and Sooman Singh, amount to a severance of this property from the rest of the family property, and an allotment of it to Gurdial Singh as forming part of his separate share?

Returning back to the position taken up by the plaintiff to the effect that this property as being property affected by special custom was thereby made impartible, and only capable of being enjoyed by the elder member of the family, we must bear in mind

that the other members of the family can by the nature of the case have exceedingly little interest whatever in property so situated. If the elder member of the family so possessing property has not a natural son, he can always secure to himself a direct successor in his own line by adopting a son, and thus there is always at any time an exceedingly small chance that the other members of the family, whom I suppose to be joint with him in respect to this property, will ever themselves or their lineal descendants come to have the personal enjoyment of it.

The non-occurrence then for a considerable period of any separation of these members from the elder member in respect of this property might evidently be productive of very great inconveniences. In the course of a few generations it is plain that the members of this joint family, *i.e.*, all those sprung from the original root, would generally become large, and it might be a matter of considerable embarrassment and doubt to determine who really, upon the default of one line, become next entitled in succession to it. And the ordinary law of limitation could not of course operate to simplify the inquiry.

It seems to me; then, in view of the peculiar circumstances affecting the relations between the collateral members of such a joint family as this, with the member who is in actual possession of the impartible property, that Courts of Justice when called upon to consider a question such as that which is before us, ought to be satisfied upon comparatively slight evidence that a separation had actually taken place. In ordinary cases, the criterion of separation or no separation is afforded by acts of user and enjoyment. That is absent here. There is very little inducement ordinarily for the collateral members to take any part, or to do any act, either by way of separation or otherwise. They are extremely likely to let the subject alone to drift down the course of time as it may. The case indeed is somewhat analogous to the case of a question relating to the occupation of comparatively waste or waste land; and it is there acknowledged that the smallest indication of occupation must be taken hold of and used as evidence in the determination of any matter of dispute with regard to it between the contending parties.

What then was the nature of the transaction between these representatives of the joint family in 1832? Two deeds were executed; one by Gurdial Singh alone, and

the other, by Ramdial Singh and Sooman Singh together; and these are to some extent counterparts of one another. Gurdial Singh's document says:—

"Whereas Chowdhry Birj Raj Singh, my father, departed this life in Assin 1247 Fuslee: And whereas my late father, in accordance with family custom, which prevails with regard to Talooka Gungore, for the eldest son to succeed to the proprietorship after the death of the registered proprietor, constituted me, the declarant, the proprietor and his successor to the whole estate aforesaid and all properties, accordingly, that is to say, in accordance with the will of the father and family custom, Talooka Gungore, the ancestral estate, has been in my possession without any other participating or having shares therein. Four annas of Mouzah Purmessurpore, Pergunnah Chye, an estate purchased by my paternal grandfather, named Chowdhry Munyar Singh, has, in accordance with the will of my late father, been partitioned equally among us, that is, 1 anna 6 gundahs and a fraction above 2 cowries has been allotted to me Gurdial Singh, and 1 anna 6 gundahs and a fraction above 2 cowries has been allotted to Sooman Singh my uncle, *viz.*, the youngest brother of the above-named Chowdhry, and 1 anna 6 gundahs and a fraction above 2 cowries to Ramdial Singh, my younger brother and the adopted son of Gooman Singh, my second uncle. Moreover, Ramdial Singh and Sooman Singh have, under their hand and seal, duly executed a deed to that effect, dated the 31st January 1832, corresponding with the 19th Magh 1239 Fuslee, in my favor with regard to having no interest in Talooka Gungore conformably with family custom, and agreeing to the equal shares in 4 annas of Mouzah Purmessurpore above referred to, which deed is duly attested by witnesses. Consequently, I do declare and state in writing that, from 1239 Fuslee, Ramdial Singh and Sooman Singh aforesaid shall be in possession in proportion to their respective shares, by collecting the rent of Mouzah Purmessurpore, and appropriate the profits thereof after paying the Government revenue. Besides this, one shall not have any claim to property which is in the possession of the other, and *vice versa*. These few words in the way of a deed of partition of 4 annas share of Mouzah Purmessurpore have therefore been written that they may be of use when needed."

The counterpart commences:—"We are Ramdyal Singh, son of Chowdhry Birj Raj Singh, and adopted son of Gooman, second brother of the said Chowdhry," and so on.

It recites in pretty nearly the same words as those which I have read from Gurdial Singh's deed, the condition of the property. Then comes this passage:—"Talooka Gungore, 'Pergunnah Bhurrakea, comprising five 'mouzahs, both *uslee* and *dakhilee*, an 'ancestral estate, has been, in accordance with 'family custom, from time immemorial held 'by one person, the eldest son, and the 'registered proprietor, from generation to 'generation, and in case the registered 'proprietor dies without issue, the younger 'brother of the deceased, or his eldest son, 'becomes the rightful proprietor. The said 'Gurdial Singh is competent to present a 'petition and have his name enrolled in the 'Collectorate records on the excision of the 'name of Chowdhry Birj Raj Singh, deceased, 'in respect of the entire talooka aforesaid, 'and after payment of the Government 'revenue appropriate the produce thereof 'without allotting any shares, and any other 'participating therein. We the declarants 'have, and shall have no claim, right, or 'demand in respect thereof. If ever we or 'our heirs hereafter, contrary to this deed, 'prefer any claim for copartnership or 'shares in Talooka Gungore aforesaid 'before the authorities for the time being, 'such claim shall be null and void and of 'no effect."

Then the document goes on to deal with the fractional share of Purnessurpore property.

We have evidence here of a separation relative to Gungore, which is substantial, and greatly stronger than might *a priori* have been expected.

It seems to me plain upon a consideration of these two documents that Talooka Gungore was set apart by the contracting parties and allotted to Gurdial Singh as his separate property. And I gather further from them that the custom which has been spoken of by both sides as a custom of the family in respect of this talooka is not a custom, never was a custom in derogation of the law of the land, but was as in such passages it is termed, merely the usage of the family, that which the family were accustomed to do generation after generation in respect of this talooka. Both sides say that the allotment of the Talooka Gungore to Gurdial Singh is not merely the result of the custom, but that it is in accordance with the

desire of the father. It appears to me that the only construction which can be rightly put upon this transaction of partition is that the dividing parties followed the usage which had prevailed for generations in the family upon a division of the property being come to, and that that had been so at the express desire of the deceased father,—that usage being to give over Talooka Gungore to the eldest member in addition to the other shares which he took by the partition of the other part of the family property.

When we have arrived at this construction relative to the effect of these two deeds, and go back from 1832 to the various other transactions of the like kind which have taken place in the family, it is I think perfectly easy to see that they too correspond with the transaction of 1832 in all respects. Indeed, it was at first rather difficult to understand how it happened that the parties to this suit and the former members of the family should be entirely of accord with one another relative to the custom which is said all along to have prevailed in the family in regard to the descent of this talooka, yet that notwithstanding, at every decease of the holder of the Talooka Gungore, there was admittedly a contest raised by the other members of the family for the possession and enjoyment of it. These facts are inconsistent with the acknowledgment of a custom of descent having the force of law, but they are entirely consistent with the view which I have endeavoured now to express.

And that Talooka Gungore was by this transaction allotted to Gurdial, and did not come to him merely by force of a sort of law of inheritance is, I think, made plain by subsequent events; for, when Gurdial died, Ramdial immediately brought a suit against his widow and two infant sons, claiming a moiety of Gungore, as ancestral property, without as far as I understand disclosing the fact of the partition effected in 1832. Afterwards, however, Ramdial compromised this suit, and stipulating that he should retain a certain 100 beegahs of land within the talooka which he had managed to get into his hands, made the following acknowledgment:—"I and my heirs in accordance with the provisions of the said deed of partition (*i.e.* of 1832) have and shall have no interest in the said Talooka Gungore." This was in 1852, and Chintamun, the present plaintiff in 1871, can hardly escape the construction which his father thus placed upon his own deed of 1832. Moreover, Chintamun himself in 1863, after

his father's death, when a suit was brought against him, his minor brothers, and Runjeet Singh, by one Rooshun Singh, a cousin, said in his written statement:—"Talooka Gungore from former times conformably with former custom has been possessed by Munyar Singh, after him by Birj Raj Singh, after whom by Gurdyal Singh, and after his death by Runjeet Singh, the eldest son. The plaintiff (Rooshun) or his father, or myself, or my father have no interest therein. For this reason the said talooka has remained in the possession of Runjeet Singh."

I think I have said enough to explain the view which I have taken of the facts of this case; and if that view is correct, it follows that Gungore, as well as Purmessurpore property, was the separate property of Runjeet Singh when he died. And inasmuch as the custom restrictive of the widow's right to succeed her husband has not, as I have already remarked, been made out by the evidence in this case, it also follows that the plaintiff fails to make out his right to Gungore, as well as to the rest of the property. And therefore this suit ought to be dismissed altogether with costs in both Courts.

Morris, J.—This was a suit avowedly instituted "pursuant to the Mitakshara right and the ancient family usage," to establish right to succession to, and possession of, certain properties of one Runjeet Singh, who died on the 1st Bysack 1276. The Lower Court has found that plaintiff did not live in commensality with Runjeet Singh, who was his first cousin, and that, with one exception, the properties specified in the plaint did not pertain to a joint undivided estate, and that consequently under the Mitakshara shaster, plaintiff could set up no claim to them. The exception relates to a property called Talooka Gungore, and in respect to this the Lower Court has decided that in consequence of "the ancient family usage of single succession of the eldest son," plaintiff, as the nearest of kin of the deceased Runjeet Singh, is entitled to the proprietary right of the whole talooka. This decision is impugned in appeal on the ground, amongst other grounds of objection, that "Talooka Gungore was the sole and exclusive property of Runjeet Singh, and that there was no allegation in the plaint, much less reliable proof afforded of the nature of a family custom that, in case the last owner of Gungore died without male issue after separation from his co-heirs, the

"property would not descend according to ordinary Hindoo law, but would go to the eldest male descendant of the original ancestor in exclusion of the legal heirs of the last owner."

This objection appears on a consideration of the evidence to be well-founded. Doubtless, for many generations, this talooka has descended in the line of the elder branch of the family, and been in the sole and absolute possession of the eldest male members of that branch; but a review of the family history will explain how this has come to pass. So long ago as 1788, the succession of Munyar Singh, great-grandfather of Runjeet Singh, was disputed by Pertab Singh, Bundhoo Singh, and other heirs, but the suit was dismissed. On the death of Munyar Singh, his eldest son Birj Raj Singh was in 1803 recorded in the Collectorate books as absolute proprietor of Talooka Gungore, and his right to this was confirmed a few years after in a suit for partition of a one-third share of proprietorship brought by Rajun Singh, brother of Munyar Singh, supported by another brother Gunput Singh, who was made a *pro formâ* defendant. The Court found, January 26th, 1808, that the plaintiff and Gunput Singh were never in possession of the estate; that the operation of Section 5 Regulation XI of 1793 had secured the entire estate to Munyar Singh in his own person, and that from the family custom of the parties it was evident that no co-sharer ever obtained a share of the estate. It therefore dismissed the plaintiff's claim. The two brothers of Birj Raj Singh, *viz.*, Gooman Singh and Sooman Singh took no part in this suit, and throughout their elder brother's life-time raised no objection to his being sole proprietor of Talooka Gungore. This conduct on their part during their brother's life-time indicates their acquiescence in the family custom by which this estate became vested in the head of the family. On the death, however, of Birj Raj Singh, the succession of Gurdyal Singh, the eldest son, was disputed by Sooman Singh, his uncle, and Ramdyal Singh, his only brother. Each claimed a share in the talooka. The dispute was settled on the 31st January 1832 under the terms of an "ikrarnamah" on the part of Gurdyal Singh, and of a "tukseemnamah" on the part of the uncle and brother. The "ikrarnamah" recited that "in accordance with his (Gurdyal Singh's) father's will and the family custom, Talooka Gungore, an ancestral estate, has remained in my possession without any one participating

"therein." It went on to say that by the father's will the rest of the estate was to be divided in equal shares among the other members of the family, and that Sooman Singh and Ramdyal Singh had executed a deed in his favor with reference to their having no interest in Talooka Gungore in accordance with family usage, and that they agreed to the equable allotment of shares of the 4 annas of the zemindaree estate of Mouzah Purmessurpore, &c. The "tukseemnamah" executed by Sooman Singh and Ramdyal Singh was much to the same effect. These two declared that "they had and should have no claim, right, or demand in respect of Talooka Gungore, and that, if they or their heirs hereafter preferred any claim for co-partnership or shares in Talooka Gungore, such claim should be null and void and of no effect." They expressed themselves content with their specified shares in Mouzah Purmessurpore, and the reason they gave for their concurrence in this matter is recorded in these words:—"Talooka Gungore had been in accordance with family custom from time immemorial held by one person, the eldest son and the registered proprietor from generation to generation, and in case the registered proprietor dies without issue, the younger brother of the deceased or his eldest son becomes the rightful proprietor." On the death, however, of Gurdyal Singh, this agreement was ignored by Ramdyal Singh, and he again instituted a suit for possession of a moiety of Talooka Gungore,—Mussamut Radha Kooeree, mother and guardian of her minor sons Tiluckdharee Singh and Runjeet Singh, and after the death of Mussamut Radha Kooeree and Tiluckdharee Singh, Mahtab Singh, a guardian of Runjeet Singh, being the defendants. This suit was disposed of on the 17th February 1852 in accordance with a compromise effected between the parties. Ramdyal Singh consented to abide by the terms of the "ikrarnamah" of 1832 on the consideration of an assignment of 100 beegahs of Talooka Gungore in his favor to be held by him and his heirs hereafter. In his petition to the Court, after stating this consideration, he goes on to say:—"I have and shall have no interest in Talooka Gungore bond debts, cattle, mesne profits, &c., claimed by me." This agreement was further ratified and confirmed by the plaintiff in the present suit, Chintamun Singh, son of Ramdyal Singh, on the occasion of a suit brought by Rooshun Singh, son of Sooman

Singh, for possession of a 4 annas share in Talooka Gungore, which suit also was dismissed. In the fifth paragraph of his written statement, he made this declaration:—"Neither the plaintiff nor his father, nor myself nor my father, have any interest in the talooka." The result of the suit was that the exclusive right of Runjeet Singh in Talooka Gungore was affirmed, and plaintiff was maintained in possession only of the share in Mouzah Purmessurpore which he derived from his father. It thus appears that, although during the past four generations, different heirs of the common ancestor have on each occasion of the death of the recorded proprietor laid claim to a share in Talooka Gungore as appertaining to the joint family property, their claims have been dismissed or waived by themselves, and the absolute proprietorship, first of Munyar Singh, then of Birj Raj Singh, then of Gurdyal Singh, and lastly of Runjeet Singh in it recognized and established. As proprietor succeeded proprietor, there has been a fresh and constant conversion of the talooka into separate estate, and so the talooka has become further and further removed from the joint ancestral property. Each succession necessitated the making of a new arrangement by which the estate became the exclusive property of one person, all the near heirs either acquiescing in his sole proprietorship or waiving their rights by express engagement in his favor. To this are attributable the disputes that arose on the demise of each proprietor, and thus on the succession of Birj Raj Singh, though his uncle disputed his sole proprietorship, his two brothers did not; and on the succession of Gurdyal Singh, an express engagement was entered into between him and his brother Ramdyal Singh and uncle Sooman Singh by which the latter surrendered to the former all their interest in Talooka Gungore. And although in 1852, after the death of Gurdyal Singh, and during the minority of his sons, Ramdyal Singh attempted to set aside this engagement, he eventually agreed to abide by it and to retain no further interest in Talooka Gungore on a consideration of 100 beegahs of the said talooka being assigned to him and the right of the heirs of Gurdyal Singh in the talooka being reduced to that extent. The question then that now arises is what is the proper construction to be put on these instruments of "ikrarnamah" and "tukseemnamah" executed on the 1st of January 1852. So far as words carry any meaning, the deed of

"tukseemnamah" contains an absolute renunciation on the part of Ramdyal Singh and Sooman Singh of all interest in Talooka Gungore in favor of Gurdyl Singh. The two state expressly that in ceding this property to Gurdyl Singh, they are governed by the wishes of Birj Raj Singh and by what has hitherto been the custom of the family.

This custom is defined by them to be to make the eldest son the registered proprietor from generation to generation absolute proprietor of Talooka Gungore, and in the event of failure of issue his younger brother or the eldest son of such younger brother is to succeed. Having regard to the manner in which Talooka Gungore has been detached for so many generations from the joint estate and to the terms of the "tukseemnamah," it is clear that Ramdyal Singh and Sooman Singh never contemplated the possibility of the talooka returning to their hands, but made an absolute waiver of their right in respect to it. Ramdyal Singh also, by his acceptance of 100 beegahs of Talooka Gungore, recognized the right of Gurdyl Singh to treat it as separate estate. The renunciation by Ramdyal Singh of his interest in the talooka must be held to bind his son Chintamun Singh, the present plaintiff, who, as has been already mentioned, by the written statement which he filed in 1863 in the suit of Rooshun Singh, has signified in precise terms his acquiescence in the acts of his father. The contingency that has now occurred of default of male heirs in the direct line of Gurdyl Singh or of default of a younger brother of the registered proprietor or eldest son of such younger brother was evidently never contemplated, and was consequently not provided for. Chintamun Singh must, therefore, as it seems to me, abide by the acts of his father and Sooman Singh and by his own admissions, and he can reap no benefit from a family custom which, as defined by the members themselves of that family, is so restricted in its operation. It is impossible for a Court of Justice to give a wider latitude to the family custom than the members have themselves given to it, and therefore as Runjeet Singh, the last registered proprietor of Talooka Gungore, has died without male issue, or without leaving a younger brother or eldest son of such younger brother, and the estate has been found to be his absolutely, the succession to it must be governed by the ordinary law, and so his widow, and not the plaintiff, is entitled to succeed. In this view, the judgment of the Lower Court, in respect

to plaintiff's right to succeed to Talooka Gungore, must be set aside, and the suit dismissed with costs in both Courts.

The 10th July 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Sale of Security—Proof of Bond Debt—Commission to examine Witnesses—Act VIII of 1859 s. 175.

* Case No. 127 of 1872.

Regular Appeal from a decision passed by the Officiating Judge of Purneah, dated the 8th January 1872.

Amrith Nath Jha (Defendant) *Appellant,*

versus

Dhunput Singh Bahadoor (Plaintiff)
Respondent.

The Appellant in person.

Mr. R. T. Allan and Baboos Sreenath Doss and Rash Beharee Ghose for Respondent.

No Court of equity ought to direct hypothecated property to be sold, and its proceeds applied to the satisfaction of the debt for which it is security, without first taking care to ascertain that the debt stated to be due in the security bond is really due.

An application for the issue of a commission under Act VIII of 1859 s. 175 should be supported by some reason other than the mere distance of place of residence of the witness. If the witness is a stranger, a commission will be right and reasonable; but not if he is a servant of the party applying.

Phear, J.—It appears to us that the trial of this case in the Court below has not been complete and satisfactory, and for that reason it must be remanded for re-trial.

Eleven issues were framed, and apparently these issues very fairly expressed the material points on which the matter of contest between the parties ought finally to be determined.

The first issue is substantially a question of law turning on the construction proper to be given to certain passages in the bond on which the plaintiff bases his cause of action.

The second issue is simply a question of fact, namely, whether certain kists due under the terms of the bond have been paid by the defendant to the plaintiff or not.

We need not state further the substance of the remaining issues, because

the Lower Court has placed its decision upon the determination of these two mainly.

As to the third, fourth, fifth, sixth, and seventh issues, the Judge says:—"I must decline to go into them on their merits, whatever those merits might be in separate suits."

The eighth, ninth, and tenth issues, the Judge has determined in favor of the plaintiff upon the evidence of witnesses who were examined on commission on behalf of the plaintiff; and the eleventh issue, which seems to be a question of law arising out of the construction of the bond, he has determined against the defendant.

It appears to us that the Judge is not wholly right in the view which he has taken of the bond, on which view he has determined the first issue; and as to the second issue, of payment or no payment by the defendant, for some cause or another there is no evidence bearing on it excepting the evidence of the witnesses who appeared on behalf of the defendant, and who swore positively to the payment of the money.

The Judge, for the reasons which he has given, has come to the conclusion that these witnesses are not to be believed on their oath; and on this ground he has found this issue in favor of the plaintiff, although the plaintiff has not adduced any evidence whatever to meet the evidence brought by the defendant; and none of his witnesses who were examined on commission, have stated that these payments, or any of them, were not made.

The Judge may possibly be right in the view which he has taken of the value of the testimony given by the defendant's witnesses, but we feel ourselves not in a position to say judicially that he was so in the absence of that evidence on the side of the plaintiff which unquestionably he ought to have brought, and could have brought if his case were true. It is not enough to say—as has been said before us—that the absence of this evidence is probably due to some blunder of procedure in the Court below, because the principal witnesses of the plaintiff who by their employment and business were qualified and in a position to speak to this issue were examined on commission before the trial was had in the Court below, and before the plaintiff could know that the Court would take the view which it has done, or would fail, as is now suggested, to carry out the trial properly; and although these witnesses were examined on commission before trial they were not asked a single question by

the plaintiff relative to the issue of payment or non-payment.

In this state of things, we are of opinion that the finding of the Lower Court on this question of fact has been so unsatisfactorily arrived at, that we ought not to allow it to stand.

Next, the Judge is clearly wrong in refusing to enquire into the merits of the issues from three to seven. These issues are directed to the amount of consideration given for the bond. Now, this bond is not a mere money bond. It is a mortgage security by which the defendant hypothecated certain property as security for the repayment of the sum of Rs. 80,000, stated in the bond to be the debt which he owed to the plaintiff. This Court, and the Court below, is called upon as a Court of equity to make this property so hypothecated available for the purpose of repaying the plaintiff that which is due to him on the bond; and we take it that no Court of equity ought to direct the property to be sold and its proceeds applied to the satisfaction of a debt without first taking care to ascertain that the debt is due. It is not enough that it should be stated in the security bond itself to be due. It is quite open to the defendant to dispute such a statement, if the facts are such as to justify his doing so, and to ask the Court to enquire what is equitably due from him to the plaintiff on the bond before it orders the mortgaged property to be sold; and it appears to us that the issues three to seven do put in question matter such that, if these issues are determined in favor of the defendant, a very considerable reduction ought to be made in the amount of money which the Court should direct to be realized by the sale of the property.

Next as to the issues eight, nine, and ten, the Court has, as has already been mentioned, determined these issues on the evidence of the plaintiff's witnesses who were examined on commission. The sums of money the advance of which is questioned in these issues are said to have been secured by hoondees, or paid as debts due under hoondees; and while those witnesses say that the whole money was paid, they add that they do not know where the papers and documents are, because they were sent on to the branch kotee at Purneah; that is, to the plaintiff's own kotee at the place where the trial was held; yet these papers are neither produced nor accounted for.

The defendant complains that he has had no opportunity of meeting any issue

excepting the second; and there is clearly some ground for this complaint.

The Judge says he refused to postpone the case in order that opportunity for the attendance of further witnesses on behalf of the defendant should be given. Perhaps it is hardly necessary for us now to remark upon the reasons which the Judge has given for refusing this postponement. The fact is certain that no witnesses have been examined by the defendant on any issue except the second, and the testimony of the witnesses examined on commission for the plaintiff, coupled with the absence of the material documents relating to it, affords very unsatisfactory ground for the determination of this issue in favor of the plaintiff.

It appears to us that there is reason to suppose that some of the defendant's witnesses were actually in attendance, and were not examined. There are warrants on the record which appear to have been executed, and according to which witnesses must have been brought up, and been present at the time of the trial, and we think it right to add that in a case of this kind the Court ought not to have been over-ready to allow the principal witnesses, on whose evidence the plaintiff's case depended, to be examined out of Court.

It is true that under Section 175 of the Civil Procedure Code, when the evidence of a witness is required who is resident at some place more than a hundred miles distant from the place where the Court is held, the Court may of its own motion, or on the application of any of the parties to the suit, or on the representation of the witness, order a commission to issue for the examination of such witness. But an application for this purpose should be supported by some reason other than the mere distance of place of residence of the witness. If the witness is a third person although a stranger to the suit, it is fair and reasonable to him that he should not be harassed by being brought a hundred miles to give evidence for people with whom he has no concern, and in such a case it is right and proper that the Court should issue a commission for his examination. But when an application is made by a party to the suit to have the examination of his own servants and dependents held on commission away from the Court, we think the Court ought to ask why it is that the witnesses cannot be brought by their master before the Court itself to give their evidence *vivâ voce*.

The difference between the examination of a witness on commission, and the examination of the same person *vivâ voce* in Court is so

great, to the disadvantage almost invariably of the opposite side, that the Court ought very jealously to enquire into the reason why a plaintiff, in particular, should desire to keep his servants away from the actual trial. There may, of course, in this case be good reason why some of these persons, if not all of them, should not be compelled to come all the way from Moorshedabad to Purneah, but no reason is suggested by any thing on the record.

On the whole, we are of opinion that the trial and investigation of this case in the Court below has been so defective in most material particulars as to fail to be a complete and fair trial between the parties. We, therefore, reverse the decision of the Lower Court, and remand the case for re-trial on the issues which have been already framed. Both parties must be allowed the opportunity of adducing before the Court such evidence bearing on the issues as they may think fit, and costs will abide the event.

The 10th July 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Hindoo Wills—Attesting Witnesses—Indian Succession Act.

Case No. 122 of 1873.

Miscellaneous Appeal from an order passed by the Judge of 24-Pergunnahs, dated the 18th February 1873.

Huree Dossee and another (Petitioners)
Appellants,

versus

Woomachurn Dutt (Opposite Party)
Respondent.

Baboos Ashootosh Dhar and Mohendro Lall Mitter for Appellants.

Baboo Chundernath Bose for Respondent.

The Civil Court cannot act upon, or take cognizance of, a will to which there is only one attesting witness, and this applies also to Hindoo wills.

Jackson, J.—THIS was an application for a certificate under Act XXVII of 1860, and the Judge has refused to consider it on the ground that there is a will which has been filed in his Court, and the executor appointed under that will is willing to act. The will which is on the record has been submitted for our inspection, and it appears that there is only one, if there is one, attesting witness to it. Section 50 of the Indian Succession Act, which is one of the Sections made applicable to Hindoos by the Hindoo Will's Act, requires that there should be two attesting witnesses. The will, therefore, is not one upon which the Judge could act and of which he could take cognizance. The directions under the will, therefore, are not valid. It will be for the Judge to consider who is entitled to a certificate as provided by Act XXVII. The case must go back for this purpose.

The 11th July 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Suit for enhanced Rent—Defective Notice.

Case No. 1338 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 2nd April 1872, affirming a decision of the Moonsiff of Kudwah, dated the 27th January 1872.

Syefoollah Khan and another (Plaintiffs)
Appellants,

versus

Kalee Pershad Sahoo and others (Defendants)
Respondents.

Mr. C. Gregory for Appellants.

Baboo Kishen Dyal Roy for Respondents.

The Court refused to interfere with an Appellate Court's decision dismissing a suit for arrears of rent at

an enhanced rate after notice, where the notice failed to specify the grounds of enhancement distinctly, and such want of distinctness led to incompleteness of trial in the first Court.

Phear, J.—THIS is a claim for arrears of rent at an enhanced rate after notice; and the Lower Appellate Court has dismissed the plaintiff's suit on the ground that the notice of enhancement is not sufficiently specific in the expression of the grounds upon which the enhancement is sought.

It is very plain that the notice of enhancement is very far from furnishing a clear statement of any one of the grounds mentioned in Section 18 Act VIII (B.C.) of 1869. Nothing can be well more vague and confused than the statement which the zemindar has in this case chosen to make of the facts which give him the right to ask for enhancement. In many instances of this kind, although the notice may be defective, still if it appear that the parties were never at any time misled, and that as full and complete a trial has been had as would have been the case had the notice been perfect, this Court is disposed to overrule any objection based merely upon the technical ground of irregularity, in the form of the notice.

But we feel ourselves unable to say on this special appeal that the Lower Appellate Court has dismissed the plaintiff's suit upon purely technical grounds. Not only does the notice fail to specify the grounds of enhancement distinctly, but it seems that this want of distinctness has led to incompleteness of trial in the first Court.

Mr. Gregory is obliged to admit that the evidence intended to bear out the second ground of enhancement does not contain in it all the elements necessary in order to enable the Court to judge whether the first Clause of Section 18 of Act VIII of 1869 is established by the plaintiff or not. This being so, and the failure being clearly attributed to the fault of the plaintiff himself, we do not think that we ought to interfere and set aside the decision of the Lower Appellate Court. If we did so, it would only be for the purpose of ordering a new trial by the Appellate Court on the evidence which is on the record; and seeing that that evidence is very imperfect in one most material respect owing to a corresponding defect in the notice, it appears to us that we ought not to disturb the decision at which the Lower Appellate Court has arrived.

The appeal is dismissed with costs.

The 11th July 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Instalment Bond—Penal Interest—Compensation.

Case No. 751 of 1872.

Special Appeal from a decision passed by the Judge of Bhargulpore, dated the 12th February 1872, affirming a decision of the Moonsiff of Mudhepoorah, dated the 31st August 1871.

Hurbullubh Narnin Singh (Plaintiff)
Appellant,

versus

Genda Moharaj (Defendant) *Respondent.*

Baboo Aulnash Chunder Banerjee for
Appellant.

No one for Respondent.

In a suit to recover from a ticcadar certain arrears of rent and (under the denomination of "interest") an increment of 50 per cent. on the amount reserved according to a stipulation in the kubooleut that such increment should become due in the event of non-payment of an instalment on the day on which it was to be paid:

Held that the 50 per cent. stipulated for was in the nature of a penalty, as it bore no relation to any actual or supposed loss which the zemindar might sustain from delay in the payment, and that plaintiff was entitled to recover only so much as would compensate him for such loss.

Phear, J.—In this case, the zemindar seeks to recover from his ticcadar certain arrears of rent, which he says are due to him under the terms of a kubooleut, together with interest; and to his plaint he attaches a schedule which represents the arrears of rent unpaid to be Rs. 90, and the interest on the over-due instalments not paid according to the kubooleut Rs. 109-13.

He bases his somewhat remarkable claim on this clause of the kubooleut:—"Further, 'that in default of a kist, that is, failing to 'pay the malgoozaree on the day fixed for '(paying) instalments as per detail below, 'I shall pay the zemindar malgoozaree with 'half as much again.' And in the 'detail' below, the annual jumma is stated to be Rs. 725 payable in three kists; 4 annas on the 25th Assin; 8 annas on the 30th Pous; 4 annas on the 5th Chyet.

Thus, the part of the claim which in the plaint is denominated "interest" is in reality an increment of 50 per cent. added to the actual amount of rent reserved, according to

terms of the detailed schedule appended to the kubooleut, which only becomes due in the event of non-payment of an instalment on the particular day upon which the instalment was specified to be paid.

The defendant did not appear, and the Courts below have found that the plaintiff is only entitled to recover the Rs. 90, the actual amount of the instalment which was not paid, and that he is not entitled to recover the additional 50 per cent. on the amount which he claims.

The first Court has, however, given a small sum of Rs. 10 by way of interest, and the Lower Appellate Court dismissed the appeal which was brought against that decision.

This claim is, no doubt, somewhat of a peculiar character, and belongs to a class of cases which depend on a question of some nicety. We will give instances by way of illustration.

If a debtor becomes bound to pay a certain specified sum on a fixed day, and the creditor at the same time stipulates that he will accept a lesser sum as satisfaction of the debt, provided that it be paid punctually on that day; then, in the event of payment not being made punctually on that day, the creditor is afterwards entitled to claim the full amount of the debt. The debt was due from the commencement of the transaction and the undertaking on the part of the creditor that he would accept a less sum in satisfaction of the whole, if it be paid punctually, does not deprive him of his full right in the event of the less sum not being so paid.

Again, if a debtor becomes bound to pay a sum of money on a fixed day, and for any reasons which are known to the parties it will be a cause of loss to the creditor if the money is not paid on that day, and the parties at the time of making the contract further agree that that loss shall be measured by a stipulated amount in the shape of damages, then, in the event of default being made in punctual payment, the creditor will be entitled afterwards to recover the whole debt together with the sum agreed upon as liquidated damages.

A third case will be one where the parties agree that the loss which may accrue to the creditor from the non-payment of the debt on the day fixed should be covered by interest on the debt running from that day with the time, at a fixed rate per cent.; in that event, if default in punctual payment occurs, the creditor can recover the debt *plus* the interest.

A fourth illustration is the case where the creditor desires punctual payment of the debt, and seeks to ensure it by stipulating that, if the money is not paid on a certain day, a certain larger sum shall become due, and that he shall be entitled to claim that sum afterwards. In the latter case, the stipulation for the extra sum is viewed as a penalty, by the operation of which the creditor sought to secure punctual payment; and in such a case, if default in punctual payment occurs, a Court of equity will relieve the debtor from the payment of the whole penalty if it be shown that the loss which the delay in payment has caused to the creditor will be compensated for by a less sum. The Court of equity considers that the creditor will get all that he ought to get from the stipulation for the penalty, if he is repaid the reasonably estimated loss which non-punctual payment has caused him.

Therefore these illustrations will show that in all cases of this kind, the first question which the Court has to ask is—Does the stipulation for the extra payment bear the character of a penalty, or is it a sum which the parties with their eyes open have agreed is a fair and proper compensation to the creditor for want of punctuality in repayment? If the latter, the creditor ought to be allowed to recover the full sum in its entirety. If the former, that is, simply a penalty, he ought only to recover so much as will place him in the same position as he would have been in if his debt had been punctually paid.

After giving our best consideration to the case which is before us, we think that it accords with the fourth illustration given. The 50 per cent. stipulated for in the Clause of the kubooleut was very clearly of the nature of a penalty. It bore no sort of relation to any actual or supposed loss which the zemindar might sustain from delay in the payment of the instalments. It was a penalty imposed on the ticcadar with a view to secure punctual payment of the kists reserved in the potnah. This being so, the plaintiff is not entitled to recover the whole 50 per cent., but only so much as will fairly recompense him for his loss during the time that the money has been kept from him; and as nothing special is shown in this case, we think that that loss will be fairly met by interest at the ordinary rate. The plaint does not show what default or defaults were made out of which Rs. 90 accrued. It only states that Rs. 90 was the arrear for the year

1278, and the suit was brought by the zemindar in the following year.

It would thus appear that the Rs. 10 awarded by the first Court, in addition to the Rs. 90, would very completely represent any sum to which the plaintiff is entitled as compensation for the non-payment of the Rs. 90, and therefore it seems to us that the decree of the first Court, which was affirmed by the Lower Appellate Court, was in substance a right decree.

Accordingly, we dismiss this appeal, but without costs as the respondent has not appeared.

The 12th July 1873.

Present :

The Hon'ble F. A. Glover, Judge.

Tenancy of Co-sharer—Rent—Act VIII (B.C.) of 1869 s. 102.

Case No. 1747 of 1872.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 24th July 1872, reversing a decision of the Sudder Moonsiff of that district, dated the 1st May 1872.

Sreemutty Alladinee Dossee and another
(Defendants) Appellants,

versus

Sreenath Chunder Bose and another
(Plaintiffs) Respondents.

Baboo Ashootosh Mookerjee for Appellants.

Baboos Romesh Chunder Mitter and Kalee Mohun Doss for Respondents.

A co-sharer in an estate who cultivates a portion belonging to himself and the other shareholders should *pro tanto* be considered their tenant.

Payment by such co-sharer for land so cultivated, by whatever name it be called, is substantially rent, and a suit for such rent comes properly under Act VIII (B.C.) of 1869 s. 102.

Glover, J.—A PRELIMINARY objection has been taken to the hearing of this appeal under Section 102 of the Rent Law which, I think, ought to prevail. The suit was one for rent under Rs. 100, and it does not appear that the Judge has decided any question of right to enhance or vary the rent of the ryot, or any question relating to any interest in land as between the parties having conflicting claims thereto.

It is contended by the pleader for the special appellant that this is not a suit for rent at all in the proper sense of the term. Both the Courts below considered that the suit was one for rent, and it was undoubtedly registered under Act VIII (B.C.) of 1869. And I am unable to understand why a co-sharer in an estate who, for his own convenience, cultivates a certain portion of the estate belonging to himself and the other shareholders should not be considered as *pro tanto* their tenant. In this particular case, the defendant clearly set forth in his written statement that he was a shareholder to the extent of eight annas, and that within the whole estate he cultivated 8 beegahs and 15 cottahs of land in nijjote; and he added that Rs. 14 a year (he does not use the word "rent" I admit) was due upon that nijjote on account of the share belonging to the plaintiff; he also said that that amount was paid annually to the plaintiff at the time of adjustment of accounts between them, the rent payable by the plaintiff for the land which he cultivates for his own use being set-off against the amount so due by the defendant. It appears to me that this payment, by whatever name it be called, is substantially rent. It was a payment made by the defendant for the use and occupation of a certain quantity of the land of a joint estate of which he as a co-sharer landlord received his portion. A case reported in the gap number of the Weekly Reporter, Act X Rulings, page 42, has been referred to as militating against this view. That case appears to be very different from the present one. There a number of shareholders of an estate agreed that if any one of them wished to cultivate on his own account before a partition was settled, he should pay so much as rent into the joint stock; and it was held that as it was necessary to ascertain what were the respective shares of the different shareholders in order to determine how much of this money the plaintiff in the case was to get, the suit was not for rent within the meaning of Act X of 1859. Here there is no question whatever about the shares. The defendant admits that he cultivates the land, that a certain amount is due to the plaintiff on account of his share, and that he pays that amount to him annually when the accounts are made up between them. The case quoted from the 12th Weekly Reporter, page 420, seems to me to be in favor of the plaintiff rather than in favor of the defendant. The learned Judges there seem to think that a suit of this sort may be

brought under this Act. It appears also that there is on the record the evidence of two witnesses who state distinctly in their depositions that the money paid by the defendant to the plaintiff was called rent. I think, therefore, that this is a case which fairly comes under the provisions of Section 102 of Act VIII (B.C.) of 1869, and that no special appeal lies.

The appeal is dismissed with costs.

The 12th July 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Special Appeal—Errors in Law.

Case No. 1454 of 1872.

Special Appeal from a decision passed by the Additional Subordinate Judge of East Burdwan, dated the 22nd June 1872, reversing a decision of the Moonsiff of Pothna, dated the 28th September 1871.

Beharee Lall Naek and another (Plaintiffs)
Appellants,

versus

Sreeram Roy and others (Defendants)
Respondents.

Baboo Nil Madhub Sen for Appellants.

Baboo Juggut Chunder Banerjee for Respondents.

Where the Lower Appellate Court assumed without evidence that the lands referred to in certain deeds of sale were identical with those in dispute, accepted without question some oral evidence which the first Court had thought unworthy of credit because self-contradictory, and put an unjustifiable construction on other evidence, it was set aside in special appeal as being in several respects erroneous in point of law.

Couch, C.J.—THE plaintiffs in this suit, who were purchasers at an auction sale in execution of a decree obtained by them against the third defendant, Kristo Dhun Roy, sought to recover his share of what was said to be the ancestral property of himself and of the defendants Nos. 1 and 2. That the property was ancestral, and that it had originally belonged to three brothers, one of whom was the grandfather of the first and

second defendants, and another the grandfather of the third defendant, was not disputed; and the Moonsiff in his judgment very properly held that in this state of things it was necessary for the defendants, whose case was that the judgment debtor Kristo Dhun Roy had no share in the property which was the subject of the suit, to show that there had been a partition of the property. The joint estate would be presumed to continue until a partition was shown to have been made.

The Moonsiff held that the defendants had not proved the partition. He found that they had not produced any deed of partition, and he considered that the witnesses whom they had examined had given evidence so contradictory that they could not be relied upon. According to his judgment, therefore, there was neither a deed of partition produced, nor was there any evidence of possession by the defendants from which its existence might be inferred. He seems to have dealt with the question before him in a very proper manner, and given a sensible judgment.

Upon appeal to the Subordinate Judge, he first considered the question whether the suit was barred by the law of limitation, and as to that he held that neither Kristo Dhun Roy, nor Goshto Beharee Roy, one member of the family who died childless, and whose share had descended to the three defendants, was ever in possession of the property in question in the suit. The reason he gives for this is that when executing the deeds of sale which had been filed in the suit, Kristo Dhun Roy mentioned in them that "the land now contested belong to the appellants and was one of the boundaries of the property referred to in the deeds."

It appears that the assumption that the land referred to in the deeds of sale was one of the boundaries of the property referred to in the suit is not justified by the evidence. There is nothing to show that the land referred to in the deeds is the same land as is now in dispute. This is not a misconstruction of the deeds, but it is assuming a fact of which there is no evidence whatever. He was certainly wrong in giving effect as he did to those deeds of sale as an admission in favor of the appellants.

He then proceeds to speak of the witnesses who had been called by the defendants, the appellants before him, and whom the Moonsiff had thought not worthy of credit on account of the contradictory evidence they gave. And he says they stated that the defendants,

and not the plaintiffs' judgment debtor Kristo Dhun Roy, had all along held the land.

This is certainly not a satisfactory way of dealing with oral evidence which the Moonsiff had said was contradictory and not worthy of credit. All that the Subordinate Judge says is simply that the witnesses said so and so, and he does not apparently consider whether they were speaking the truth or not. He then says that the oral evidence brought forward by the respondents is not satisfactory; and does with respect to this evidence what he did not do with the evidence adduced by the defendants, that is, gives a reason for saying that it is not satisfactory. The reason is that they have not said how their judgment-debtor was in possession.

Then upon the question of fact whether there had been a partition of the property, he rests his decision upon the deeds of sale and the statements of the defendants' witnesses, in the same manner as he had his decision as to the law of limitation; and he says that is satisfactory evidence that the disputed property belongs to them.

We must say, looking at what the Moonsiff had said upon the subject, it is far from right to say that it is satisfactory evidence. The deeds of sale afforded no evidence in support of it for the reason we have mentioned; and we do not think we can allow the decision of the Moonsiff, which was well-considered, to be overruled by the Subordinate Judge merely saying that the oral evidence for the defendants says so and so.

He treats another piece of evidence in a manner which we think is not justifiable. It is evidence which the plaintiffs, now appellants, and the respondents before him, had produced. He says that they had failed to refute the defendants' evidence because they had filed copies of papers in an assessment suit in which the defendants and the judgment debtors were concerned, and in which they said that the lands sought to be assessed were their lakheraj; that this must be understood to mean, not that the parties who made the statement said that the lands of which they were speaking were the joint property of the three; but that the lands being divided, they might be speaking of different portions of the land, and probably meant that one portion was the lakheraj of one of them, and another the lakheraj of another. We think he was not justified in putting such a construction upon what they said, and in disposing of the evidence for the plaintiffs in that way.

The judgment of the Moonsiff was founded upon a proper view of the case, upon what it was necessary for the defendants to prove. That judgment has been reversed by the Subordinate Judge in a judgment which we think is, in several respects, erroneous in point of law, and therefore it ought to be reversed and the judgment of the Moonsiff be allowed to stand. The appellant will have the costs in this Court and in the Lower Appellate Court.

The 12th July 1873.

Present:

The Hon'ble F. A. Glover, *Judge*.

Proprietary Title—Right to Rent—Cause of Action.

Case No. 1509 of 1872.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 25th June 1872, reversing a decision of the Moonsiff of Kytee, dated the 5th February 1872.

Moula Buksh Khulifa and others (Plaintiffs)
Appellants,

versus

Kena Mundul and others (Defendants)
Respondents.

Mr. R. E. Twidale for Appellants.

Baboo Kumla Kant Sen for Respondents.

A previous suit by plaintiff for arrears of rent having been dismissed by the Moonsiff on the ground that he

had not established the relationship of landlord and tenant between himself and the ryot defendants, plaintiff sued again to have his proprietary title declared; the ryots pleading, as before, that they held the land as lakheraj. The Moonsiff gave a decree declaring plaintiff's title and his right to rent; but the Judge on appeal dismissed the suit on the ground that plaintiff had no cause of action, and referred him to a suit for a kubooleut under Act VIII (B.C.) of 1869:

Held that plaintiff's cause of action was the denial by the defendants of his proprietary title, and as both Courts had found that title to be unquestionable it was unnecessary to send him back to the first Court on a technical ground.

Glover, J.—THE plaintiff brought this suit to have his proprietary title declared to one and half beegah of land which he said his ancestors had received as a fee for some professional services from the ancestors of the *pro formâ* defendants. He alleged that the ryot defendants who were in possession of this land refused to pay him rent; that he then brought a suit for arrears of rent for the years 1275, 1276, and 1277, in which they pleaded that they held this land as lakheraj and were not liable to pay rent to him; and that that case had been dismissed by the Moonsiff in the year 1871 on the ground that he, the plaintiff, had not succeeded in establishing the relationship of landlord and tenant between himself and the ryot defendants. The plaint is not very clear, but it certainly would seem to make this dismissal in 1871 the principal ground of his cause of action in this suit. The ryot defendants made the same defence in this case as they had made in the previous one, namely, that they held the land as lakheraj.

The Moonsiff considered that the plaintiff had made out his proprietary title, and that the defendants had failed to prove theirs; he therefore gave the plaintiff a decree declaring his right to the land and also his right to receive rent from the ryot defendants. On appeal, the Judge has dismissed the plaintiff's suit on the ground that he had no cause of action. The Judge says that the rent case previously disposed of by the Moonsiff did not in any way affect the plaintiff's proprietary title; that case had been dismissed simply on the ground that the plaintiff had not been able to prove the relationship of landlord and tenant between himself and the defendants. He then goes on to say that

"the plaintiff cannot ask the Court to say that the Moonsiff was wrong in the rent case, and to declare his proprietary title without doing so would be quite useless. It seems to me that the plaintiff's remedy is to sue the defendants under Act VIII (B.C.) of 1869 for a kubooleut offering them a pottah. Their alleged rent-free title will then be raised and adjudicated upon."

It seems to me, on the contrary, that this would be a very round-about and cumbrous way of disposing of the case. Although the plaintiff has in his plaint alleged the decision of the Moonsiff dismissing his claim for rent as his principal cause of action, we are bound to look to the whole circumstances of the case, and to see what it is that the plaintiff really asks for. No doubt the defence which is now taken in this case and the defence which was taken in the rent case is really the same, but as a matter of fact the question between the parties has been throughout whether the plaintiff's or the defendant's title is a better one; and I do not see why that point should not have been tried in the present case. To tell the plaintiff to bring a fresh suit for a kubooleut would be simply to promote litigation unnecessarily between the parties, inasmuch as the point which was decided by the Moonsiff in this case would have to be decided again in that case; and as a matter of fact, I find that the Judge in this case has substantially come to a finding upon the very point. He says:—"Looking at the plaint and the plaintiff's proof here, it seems to me that his proprietary title is unquestionable." Under these circumstances, both the Lower Courts seem to be of opinion that the plaintiff has the proprietary title in this land. That being so, it seems to me quite unnecessary to send the plaintiff back to the first Court on a technical ground like this to sue for a kubooleut, where as the Judge says the only defence that can be set up would be the alleged rent-free title, which has already been substantially adjudicated upon in this case. The plaintiff's cause of action, as it seems to me, was the denial by the defendants of his proprietary title. Whether they set up a lukheraj title or simply refused to pay rent, really comes to the same thing, and that question seems to have been decided by both the Courts below.

It appears to me, therefore, that the appeal should be allowed, the decision of the Judge reversed, and that of the Moonsiff restored with all costs.

The 14th July 1873.

Présent:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, Dwarkanath Mitter, and C. Pontifex, *Judges*.

Attachment—Manager—Regulation V of 1812 s. 26, and Regulation V of 1827 s. 3—Appeal.

Case No. 36 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Dacca, dated the 16th November 1873.

Gooroo Doss Roy (Opposite Party) *Appellant*,

versus

The Collector of Furreedpore (Petitioner) and another (Opposite Party) *Respondents*.

Messrs. Mun Mohun Ghose and R. T. Allan and Baboo Hem Chunder Banerjee for Appellant.

Mr. J. T. Woodroffe and Baboos Sham Lal Mitter and Anund Chunder Ghosal for Respondents.

An appeal does not lie to the High Court against an order of the Judge of a District Court issuing a precept to the Collector to hold an estate in attachment, and to appoint a manager under Regulation V of 1812 s. 26, and Regulation V of 1827 s. 3.

This case was referred to the Full Bench by Markby and Birch JJ., with the following remarks:—

Markby, J.—UPON the language of Regulation V of 1812 Section 26, we are disposed to think that no appeal lies in this case, but as there appears to be a "construction" of the Sudder Court to the contrary,* and as such an appeal was certainly entertained in one case† by the

* No. 717 of 21st September 1832.

† Carrau's Reports, p. 145.

Sudder Court, we think it more satisfactory that the matter should be determined by the Full Bench. The question referred is whether there is an appeal to this Court against the order of the Judge of the District Court issuing a precept to the Collector to hold an estate in attachment, and to appoint a manager under Regulation V of 1812 Section 26, and Regulation V of 1827 Section 3 (see Weekly Reporter, Volume XIX, page 170.)

Ghose for the Appellant.—The question referred for decision by the Full Bench is whether an appeal lies to this Court from an order of a District Court attaching property under Regulation V of 1812 Section 26.

There appear to have been no cases under this Regulation where an appeal has been filed in the High Court, but there are cases reported of appeals to the late Sudder Court.

Construction 717 in Carrau's Constructions and Regulations of the Sudder Court, page 248, points out that there was an appeal to the Sudder Court as to the sufficiency of the cause, and the learned Judges also allude to a case: and there are four other cases in which appeals have been allowed to the Sudder Court. The first is *Pogose vs. Gregory*, reported in Volume I of Carrau's Summary Reports at page 7. [*Mitter, J.*—The question whether an appeal lay does not appear to have been raised in that case]. The second case is that of *Nil Madhoo Surmah Chowdhry*, reported in the same Volume at page 54. The third case that is of *Joygopaul Chowdhry*, reported in the same Volume at page 116. [*Mitter, J.*—In that case the Judge's order was set aside for want of jurisdiction.] The fourth case, that of *Muhindhur Narain Roy*, reported in the same Volume at page 145, is similar to the present one: in it the Sudder Court entertained the appeal, but afterwards affirmed the Judge's order. The fifth case is that of *James Coell*, reported in the same Volume at page 150. The Provincial Court could pass any order it pleased. [*Jackson, J.*—The ground of appeal in this case is the appointment of a manager.] The question is whether the appeal is limited or not. The words "under the circumstances," &c., I submit, show that an appeal is not limited. [*Jackson, J.*—Unless you can show that the Provincial Court, and afterwards the Sudder Court, entertained an appeal, you cannot contend that an appeal lies to the High

Court.] There is no case either way. Section 38 of Act XXIII of 1861 gives an appeal from a decree. [*Couch, C.J.*—This is not applicable. Section 38 relates only to procedure, and does not give any appeal: moreover this is not a decree, but an order.] I submit that it being a final order in a judicial proceeding it is a decree. Appeals from orders under Section 166 of Act XXVII of 1860 have been entertained. [*Couch, C.J.*—You have your remedy by civil suit for *butwarra*.] No law gives an express appeal under Section 26 of Regulation V of 1812, but on the other hand no Regulation takes away the right of appeal.

*Woodroffe for the respondents was not called upon.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—The present appellate jurisdiction of this Court depends upon the words of the 16th Clause of the Charter now in force, which say that the Court is to exercise appellate jurisdiction in such cases as were subject to appeal to the High Court by virtue of any laws or regulations in force at the date of the Charter. We must, therefore, refer to the words of the first Charter, which in Clause 15 said that the Court was to exercise appellate jurisdiction in such cases as were subject to appeal to the Court of Sudder Dewanny Adawlut by virtue of any laws or regulations then in force, or which should become subject to appeal by virtue of such laws or regulations relating to civil procedure as should be thereafter made by the Governor-General in Council. In order that there should be an appeal to this Court in this case, it is necessary that there should be some law or regulation giving it.

Regulation V of 1812, which gave to the Zillah and City Judges the power to appoint a manager, gives a limited appeal. It provides that, if the revenue authorities, or any of the individuals holding an interest in the estate, shall be dissatisfied with the selection made by the Zillah or City Judge of the individual to perform the duty in question, it shall be competent for them to represent their objections to the Provincial Court of Appeal, which Court will confirm the manager chosen, or order the Judge to select and appoint another person. These words exclude the supposition that there was to be an appeal upon the propriety of appointing a person to manage the estate, or upon the questions which the Zillah Court had to consider, whether there was such inconvenience to the public or injury to

private rights from the disputes amongst the proprietors of joint undivided estates as would be a sufficient cause for putting the management in the hands of a person appointed by the Court. This Regulation, instead of giving an appeal against an order that there shall be a manager, shows, so far as the intention of the Legislature can be gathered from the words used, that there was not to be such an appeal. And there might be very good reasons for the exercise of a power of this kind not being subject to an appeal to the Provincial Court. Then there is no other law or regulation that we are aware of, and none has been referred to, which would give to the Provincial Court the power of entertaining an appeal against an order of this description.

The appellate jurisdiction of the Provincial Court was conferred by Regulation V of 1793 Section 12. In the first part, it speaks of all persons aggrieved by the decisions of the Zillah or City Courts being permitted to appeal, but the latter part of the Section shows that what was intended to be appealed from were decrees of the Courts, and not an order of this kind. It would not be a safe or a proper way of construing an Act or a Regulation where the word "decree" is used, to read it as if the words were "in the nature of a decree," as we have been asked to do. We should very often defeat the intentions of the legislative authority if we were to construe the statute law in such a manner.

The construction of the Sudder Court was an extra-judicial opinion given without any argument upon the question, and without its having been raised before the Court. We cannot consider that as having the authority of a decision of a Court pronounced in a judicial proceeding and after argument before it upon the question. There appears to be one case in which the Sudder Court allowed what was properly an appeal against an order of this kind. The other cases may rather be considered as an exercise by the Court of its superintending power than the exercise in its proper sense of an appellate jurisdiction. We do not think that this decision of the Sudder Court can be considered to have the authority which would bring the matter within the Clause in the Charter which says that the appellate jurisdiction of this Court must be that which the Sudder Court had by virtue of any laws or regulations.

We think we must say that an appeal in this case does not lie to the High Court.

The 14th July 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

*Sale for Arrears of Government Revenue—
Purchaser's Rights—Act XIV of 1859 s. 11—
Dakhillahs—Evidence.*

Case No. 1712 of 1872.

*Special Appeal from a decision passed by
the Judge of Rajshahye, dated the 16th
July 1872, reversing a decision of the
Subordinate Judge of Pubna, dated the
24th August 1871.*

Madhub Chunder Chowdhry and another
(two of the Defendants)
Appellants,

versus

Rajah Promothonath Roy Bahadoor (Plaintiff)
Respondent.

*Baboos Doorga Mohun Doss and Radhika
Churn Mitter for Appellants.*

*Baboos Sreenath Doss and Bhugobutty
Churn Ghose for Respondent.*

A party purchasing a fractional share of an estate at a sale for arrears of revenue for which share a separate account has been opened under Act XIV of 1859 s. 11, acquires it subject to all incumbrances and acquires no rights not possessed by previous owners.
The evidence of a tenant deposing to the genuineness of dakhillahs produced by him, if not rebutted, is legally sufficient to prove them.

Kemp, J.—THE defendants are the special appellants. The plaintiff alleges that the disputed property appertains to a 2 annas share of Pergunnah Nusrut Shahee; that he, the plaintiff, has purchased a portion of this 2 annas share for which a separate account had been opened in the Collector's office under the provisions of Act XI of 1859, the sale being held for arrears of Government revenue; that on attempting to take possession, he was forcibly opposed by the defendants who have no title in the property. The plaintiff, therefore, sues for khas possession of the disputed property with mesne profits. The defendants claim the property as a *shamilat* talook created long before the plaintiff acquired his title by pur-

chase at the sale for arrears of Government revenue, and urge that the plaintiff may be entitled to receive rent from them, but is not entitled to direct or khas possession.

The Moonsiff laid down the following issues:—

1st.—Whether the allegation of the defendants' *shamilat* talookdaree right is true or not?

2nd.—Whether the plaintiff can obtain possession of the disputed property or not; and if so, what sort of possession?

3rd.—What is the amount of the mesne profits, and from whom will the plaintiff realize the same?

These issues are copied from the Moonsiff's decision.

The Moonsiff found that as the plaintiff was a purchaser of a 1-anna share only, being a moiety of the mehal, *viz.*, the 2-anna share, he, the plaintiff, could only have the benefit of Section 54 Act XI of 1859, and that according to that Section the plaintiff, as auction purchaser, was not entitled to any right which was not enjoyed by his predecessor; that the plaintiff had purchased the share with all its incumbrances; that the defendants had proved their title as also possession and receipt of rent from the subordinate ryots for more than 12 years. For these reasons, the Moonsiff was of opinion that the plaintiff was not entitled to khas possession, but was only entitled to receive the rent from the defendants. The suit of the plaintiff was dismissed with costs.

On appeal, this decision has been reversed by the Judge who gives the plaintiff all he asks for, *viz.*, khas possession with mesne profits from the 28th April 1868 to the 29th April 1871, the amount to be ascertained at the time of executing the decree.

The Judge's reasons are briefly as follows:—That the onus of proving their alleged *shamilat* talookee tenure was on the defendants; that the deeds which purport to create the talook do not convey any such tenure as a *shamilat* talook, but convey a kharijah talook, the vendees being authorized to register their names as co-proprietors of Mouzah Panch Tekree in the Collectorate and to pay the revenue for that mouzah direct into the Government treasury; that the decrees for rent filed by the defendants were *ex parte* decrees and describe the defendants' tenure at one time as a "khareeda talook," at another time as "jumma in the name of the defendants;" that there was nothing to

show that these rent suits were *bonâ fide*; and that the dakhillahs or receipts for rent filed by the defendants purporting to be the receipts of Messrs. Moran and Co. are "worthless, being in no manner proved; the signer's name is illegible, and it is not shown that he had authority to grant receipts for Messrs. Moran and Co."

Further, with reference to these receipts, the Judge observes that the evidence of the defendant No. 1 alone is insufficient to prove those receipts.

That as the defendants admit that, since the date of the conveyances of 1241, the 1-anna share of the parent mehal purchased by plaintiff was sold for arrears of Government revenue and purchased by Mr. Deverinne, the vendor of Messrs. Moran and Co., it is apparent that the title acquired by the defendants under the conveyance of 1241 was extinguished. The Judge concludes his decision with the following remarks:—In this case, it was incumbent on defendants to prove that they held the Mouzah Panch Tekree as *shamilat* talookdars with respect to the 1-anna share purchased by plaintiff, because that is the claim which they oppose to plaintiff's suit for khas possession as zemindar; that the defendants had not only failed to make out that they hold a *shamilat* talook, but that they have also failed to prove that they have had any kind of possession of this particular 1-anna share of Mouzah Panch Tekree during the time Messrs. Moran and Co. were proprietors thereof, or indeed from 1851 until they opposed plaintiff entering into khas possession.

In special appeal the following grounds are raised:—

1st.—That the Judge has misconstrued the defendants' title-deed which, if read with the other documents filed by the defendants, undoubtedly prove the defendants' title in the mouzah in dispute.

2nd.—That the *ex parte* decree ought not to have been rejected as evidence.

3rd.—That the Judge was wrong in law in holding that the evidence of the defendant was legally insufficient to prove the dakhillahs of Messrs. Moran and Co.

4th.—That the Judge was wrong in law in assuming without any evidence that the party who signed those receipts had no authority to sign them.

5th.—That the Judge was wrong in law in holding that the effect of Deverinne's

purchase was to give him the estate free of all incumbrances, for he being the purchaser of a fractional share acquired no such right.

6th.—That as the plaintiff comes into Court simply on his right as an auction purchaser under Act XI of 1859, his suit for direct possession ought to have been dismissed under Section 54 of the said Act.

Tracing back the history of the estate a fractional portion of which the plaintiffs have purchased, we find that the whole estate, which comprised a 2-anna share, belonged to a family of Chuckerbuttys. A 1-anna share of this estate was purchased by Mt. Deverinne. From him that share came into the hands of Messrs. Moran and Co., whose rights were purchased by the plaintiffs at a sale for arrears of Government revenue on the 28th April 1868. A separate account had been opened for the fractional share purchased by the plaintiffs under Section 11 of Act XIV of 1859. It is therefore clear that the plaintiff is not the purchaser of an entire estate. Had he been so, he would have acquired the estate free from all incumbrances, and would have been entitled to avoid and annul all under-tenures with the exception of such as are reserved under the provisions of Section 37 of Act XI of 1859. The plaintiff being the purchaser of a share in an estate has acquired that share subject to all incumbrances, and he has acquired no rights which were not possessed by the previous owner,—see Section 54 Act XI of 1859.

With reference to the defendants' title, we may observe that the Chuckerbuttys, when the whole 2 annas were in their exclusive possession, created in favor of the defendants in the year 1241 a talook comprising the village of Panch Tekree. The deeds recite that a bonus was paid, and the talook created was of the nature of a kharijah talook, a higher grade of tenure than a *shamilat* talook. It was provided that the defendants were to separate themselves from the parent estate and to have their names registered in the Collectorate, paying the sudder jumma, jointly with the Chuckerbuttys, direct to the Collector.

The defendants did not separate themselves, and under the law then in force they could not have done so; but they continued to hold as subordinate talookdars, and have paid a uniform rent of Rs. 132-13-4 per annum to the Chuckerbuttys, to Mr. Deverinne, and to Messrs. Moran and Co.

The Judge's decision has been evidently

much influenced by the supposition that the defendants' tenure became extinguished by the purchase by Deverinne; but such is not the case, for Deverinne as purchaser of only a share acquired the property subject to all incumbrances. With reference to the dakhillahs, we think the Judge was wrong in saying that the evidence of the defendants was not legally sufficient to prove them. The Judge does not disbelieve the defendants' evidence, but says it is not legally sufficient; but it has been held by the Full Bench of this Court in a decision to be found in Volume VII, Weekly Reporter, page 527, that "the tenant having deposed to the genuineness of his dakhillahs, it will remain for the zemindar or his agent who may appear on his behalf to deny their genuineness: he also should be examined regarding them: a mere general statement that they are false should not be listened to." In this case there is nothing to rebut the defendants' evidence as to the genuineness of the dakhillahs.

Again we think the Judge was wrong in his estimate of the dakhillahs which the defendants have filed as received from Messrs. Moran and Co., the immediate predecessors of the plaintiff. These dakhillahs are printed, and bear the signature of the naib of Messrs. Moran and Co., a signature which is perfectly legible. Moreover, these documents are impressed with the seal of the firm of Messrs. Moran and Co., and we must assume, in the absence of evidence, that the naib was duly authorized to grant these receipts.

On the whole case, we think that the defendants have sufficiently established that they hold a talook paying a jumma of Rs. 132-13-6, which talook they originally acquired in 1241; that they have been in possession since 1241 paying this jumma first to the Chuckerbuttys, then to Deverinne, and then to Messrs. Moran and Co., whose rights the plaintiff has purchased; that the plaintiff as a purchaser of a share in an estate, the account of which had been separately opened by the Collector has acquired such share subject to all incumbrances, and has not acquired any rights which were not possessed by the previous owners in this case, Messrs. Moran and Co., who admitted the defendants' talookdaree right and received rent from them. The plaintiff's suit was properly dismissed by the Moonsiff. We restore his decision, and reverse that of the Judge.

Appeal decreed with costs of all the Courts payable by the plaintiff, special respondent.

The 15th July 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Abatement of Appeal.

Case No. 204 of 1872.

*Regular Appeal from a decision passed by
the Judge of Purneah, dated the 22nd
June 1872.*

Bose Bhagian (Plaintiff) *Appellant,*

versus

Charles Palmer and others (Defendants)
Respondents.

Baboo Rajendronath Bose for Appellant.

*Messrs. R. E. Twidale and C. Gregory
for Respondents.*

Where the representatives of a deceased appellant fail, within the time allowed them by the Court, to come forward to prosecute the appeal, or to give any reason for the delay, the appeal abates for want of prosecution.

Phear, J.—ON the last occasion when this appeal case was on the file, a month's time was given on the application of the appellant's pleader to enable the representatives of the deceased appellant to be placed upon the record for the purpose of prosecuting the appeal. It further appeared that the respondent, or the principal respondent, was also dead at that time. The month which was then given has now expired, and the representatives of the deceased appellant have failed to come forward to prosecute the appeal or to give any reason for the delay. The representatives of the deceased respondent are, we are told, ready, if necessary, to be placed upon the record and to defend this appeal. It appears to us, however, that there is no need of putting them upon the record.

The appeal abates for want of prosecution, and the order must be made accordingly.

The 15th July 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble E. G. Birch,
Judge.

Special Appeal—Findings of Fact.

Case No. 1446 of 1872.

*Special Appeal from a decision passed by
the Subordinate Judge of Midnapore,
dated the 29th June 1872, reversing a
decision of the Sudder Moonsiff of that
district, dated the 18th April 1870.*

Looyee Dhur Atto (Defendant) *Appellant,*

versus

Prosunno Moyee Dossee (Plaintiff) and
another (Defendant) *Respondents.*

*Baboo Hem Chunder Banerjee
for Appellant.*

*Baboo Unnoda Pershad Banerjee
for Respondents.*

In special appeal a Lower Appellate Court's findings upon a question of fact were accepted as final, although it seemed to the High Court at least doubtful whether the judgment of the first Court was not the right one, and it was not unlikely, if they had the power of going into the matter, that they might have come to a different conclusion from the Lower Appellate Court.

Couch, C.J.—THE Subordinate Judge stated, as one of the issues on the merits, the proper issue to be tried in the case, namely, whether the lands in suit constituted a *bonâ fide* debuttur tenure; and if that was found in the affirmative, whether they were liable to be sold in satisfaction of the debts of the plaintiff's husband?

The latter is not a separate question, but a consequence of the finding upon the first part.

That being the issue, the Subordinate Judge says that the mortgage bond, under which the property in suit was kept in pledge by the judgment creditor, clearly recites the mortgage of a debutter property. We cannot say that he was not at liberty to treat that statement in the mortgage bond as some evidence, although if we were hearing this case in regular appeal, we should not attach any weight to it. We cannot say as a matter of law that he was in error in treating it as part of the evidence in the case.

He then refers to the sunnuds, as to which, being in evidence, and no objection having been taken to the mode in which they were proved, they must be treated as evidence which he was entitled to consider. He says that under such circumstances, meaning apparently the statements in the mortgage and the sunnuds, there can no longer exist any doubt that the debutter property was owned by the predecessor of the plaintiff, that is, the plaintiff's husband: and further on, that it has been satisfactorily established by the evidence of six of the witnesses examined by the plaintiff that the lands in suit constitute a debutter, and that the deb-seba has been carried on from the profits of the same.

Whether he is right in the conclusion which he draws from the evidence of these witnesses, we have not the power to consider now. There was the evidence, and he says that is the conclusion I draw from it. And the law has vested in him the authority to do that.

So far he does not clearly say that the whole of the profits of the land are devoted to the purposes of the idol, but further on he says:—"Since the property in question is admitted by the defendants to be debutter," alluding apparently to the admission in the mortgage deed, "the burden of proving that they do not constitute a *bonâ fide* debutter tenure now rests with them. But it cannot be said from the evidence of the witnesses called by them that the profits of the said property are not appropriated to the deb-seba." And at the end of the judgment comes this distinct statement:—"Hence as the lands in suit are a *bonâ fide* debutter property, they cannot be sold for the personal debts of the plaintiff's husband."

Whether rightly or wrongly, the Subordinate Judge, we think, has found that the profits of this property were appropriated to the idol and that there was an endowment.

This case is distinguishable from the case in Hay's Reports, where it was decided that the appropriation of the profits of property would not constitute an endowment. It might be evidence of an endowment, but the mere fact that the members of a family had from time to time appropriated the proceeds of a portion of their property for the use of an idol would not of itself constitute an endowment. Here the Subordinate Judge has found in effect that there was an endowment, and that this property has become debutter.

The case in XIII Weekly Reporter would also not apply to this case, because there the property was charged with a specific sum for the worship of the idol. No doubt, where the charge is of a specific sum, the remainder of the property might be sold and dealt with as private property. But, here, it cannot be said that there was a specific sum to be deducted from the profits of this property, and applied to the purposes of the idol.

The finding is that the land was debutter, and we have no doubt that, if the question had been distinctly put to the Subordinate Judge, and it had been pointed out to him that the whole of the profits were not always applied for the use of the idol, his reply would have been that that ought to have been done. There is nothing here by which any distinction could be made, and it could be said that a purchaser holding this property would be liable to pay a particular portion of the profits, and might keep the rest for his own use.

Upon the findings of the Subordinate Judge, which we must take as final upon the question of fact, we do not see how we can come to any other conclusion than that this appeal must be rejected, although it does seem to be at least doubtful whether the judgment of the first Court was not the right one.

If this Court had the power of going into the whole matter, into questions of fact as well as of law, it is not unlikely that we might come to a different conclusion.

The respondent will have his costs.

The 16th July 1873.

Present:

Hon'ble Sir Richard Couch, *Kt.*,
of Justice, and the Hon'ble E. G.
Couch, Judge.

*Joint Hindoo Family—Benamsee Purchase—
Presumption.*

Case No. 1558 of 1872.

*Special Appeal from a decision passed by
the Judge of Midnapore, dated the 7th
May 1872, affirming a decision of the
Subordinate Judge of that district, dated
the 27th May 1871.*

Bhagbut Chunder Dey (Plaintiff) Appellant,

versus

Huro Gobind Pal and others (Defendants)
Respondents.

Mr. Mun Mohun Ghose for Appellant.

Baboo Doorga Mohun Doss for Respondents.

Where the father of a joint Hindoo family purchases property in the name of his minor son, the presumption is that it is a benamsee purchase by the father, on whose death it becomes the property of the family.

Couch, C.J.—THIS case appears to us to be a simple one. The plaintiff claimed as mortgagee of the entire property from Ram Gopal, and his case was that Ram Gopal was the sole owner of the property, and so had the right to mortgage the whole of it.

The burden of proof, therefore, was upon the plaintiff, for to apply to the case the ordinary rule by which the burden of proof is decided, as he could only take that which Ram Gopal was entitled to mortgage, it was for him to prove what that was, and if he failed to prove that Ram Gopal was entitled to the whole, he could not have a decree for it.

Upon the facts as found by the Lower Courts, the property which the plaintiff claims as mortgagee was purchased by the father of Ram Gopal when the latter was at school. It is true it was purchased in Ram Gopal's name, but that in India does not raise any presumption that it was purchased by Ram Gopal himself, or that the father intended it to be anything else than a purchase in the name of the son, and not giving the son any interest in it except as a member of the family. *Gopee Kristo Gossein vs. Gunga Pershad Gossain, VI Moore's*

*Indian Appeals, 53,** is a distinct authority as to what is the presumption of the Hindoo law, and where the burthen of proof lies in such a case as this is. The presumption is that it was a benamsee purchase by the father, and on his death it became the property of the family. And that state of things will be presumed to continue until the contrary is shown. Ram Gopal and his brothers would take it as joint family property coming from the father. Unless there had been a separation in estate of the family before the mortgage was made, and this property fell to Ram Gopal's share, he could not give a title to the whole to the mortgagee. But no evidence has been given by the plaintiff, and it is not found that there had been any such separation in estate, and that Ram Gopal had acquired this property as his share.

It has been objected that the Judge has given an incorrect account of what the defendant's witnesses said, and that he has mis-read the evidence where he says that although the defendant was not obliged to give direct evidence that the family was a joint one at the time of the mortgage of the property, yet he has done so, and this evidence has not by any means been rebutted.

The evidence which the defendant's witnesses gave might not, perhaps, by itself, be called direct evidence such as the Subordinate Judge says it is. The state of things being that the family was joint in property, what the witnesses stated was that there was a separation in commensality, but that they could not say whether there was any separation in estate. So far, therefore, their evidence might be said to prove that the family was a joint one at the time of the mortgage. Their saying that they did not know of any separation in estate, taken in connection with what they had said before, amounted to evidence that the family was still joint. And the plaintiff had not rebutted that in any way or shown that there had been any separation. This is not such an error on the part of the Judge as requires us to set aside his judgment, and to have the fact more directly found. We think that is what he meant. He may not have expressed himself in the most suitable way, but we see no ground for setting aside his decision upon this matter.

The question then which was presented to us by the learned Counsel for the appellant, about the presumption of Hindoo law where property is said to be self-acquired,

* 4 W. R. P. C. 46.

does not arise in this case. And it does not seem to us necessary that we should go into a consideration of the decisions of this Court upon that subject. Certainly, there is no reason for our referring any question to a Full Bench, for no question arises in this case that should be referred. But the case in the XIX Weekly Reporter, 176, having been referred to, we may remark that in the latter part of the judgment the 3rd Volume of Moore's Indian Appeals ought to have been named instead of the 12th.

The appeal must be dismissed with costs.

The 16th July 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Inheritance—Cause of Action—Act XIV of 1859 s. 1 cl. 13.

Case No. 1569 of 1872.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 8th July 1872, affirming a decision of the Moonsiff of Raneegunge, dated the 15th February 1872.

Dinonath Rana (Defendant) *Appellant*,

versus

Rukeebunnissa Bibee and others (Plaintiffs) *Respondents*.

Baboos Opendro Chunder Bose and Aubinash Chunder Banerjee for Appellant.

Moulvie Syud Murhumut Hossein for Respondents.

In a suit to recover a share of property to which plaintiff claims to be entitled by inheritance, the cause of action counts from the date of dispossession. Act XIV of 1859 s. 1 cl. 13 is not applicable.

Couch, C.J.—THIS was a suit brought to recover a share of property which the plaintiff claimed to be entitled to as having descended to him, and the question upon the law of limitation would be when he was dispossessed of it, and had thereby a cause of action. It is not a case of a member of a Hindoo family seeking to enforce his right to a share in the joint family property, but of a person who seeks to obtain the property which he had become entitled to by inheritance. The observation of the Appellate Court and of the Moonsiff that among co-sharers

in an undivided estate, the possession of one is the possession of all, is not applicable to Clause 13 of Section 1 of Act XIV of 1859. But this was not a case to which that Section applied, and the Judge in the Appellate Court says that hostile occupation of the plaintiff's share of the property, of that which had descended to him, only began in 1275. The suit was brought within the time allowed by law from that date. Upon this judgment, it seems to us that the cause of action arose in 1275, and from that time the period of twelve years ought to be counted.

The case which has been referred to, was one of a joint Hindoo family and a person claiming to be entitled to a share in the joint estate. This is a case of a Mahomedan family and one member of it asking to have the share to which he became entitled by descent.

The appeal must be dismissed with costs.

The 17th July 1873.

Present:

The Hon'ble F. A. Glover, *Judge*.

Rent Suit—Varying the Rate.

Cases Nos. 1904 to 1906 of 1872.

Special Appeals from a decision passed by the Officiating Judge of East Burdwan, dated the 31st July 1872, affirming a decision of the Officiating Moonsiff of Kytee, dated the 31st May 1872.

Dwarkanath Singh Roy Bahadoor (Plaintiff) *Appellant*,

versus

Nubo Coomar Bose (Defendant) *Respondent*.

Baboo Luckhee Churn Bose for Appellant.

Baboos Sreenath Doss and Bhugobutty Churn Ghose for Respondent.

Where a Judge found in a rent suit that, although Rs. 30-6-6 had for a great number of years been

paid by the tenant, Rs. 29-15 only was paid as rent, the remainder being a kind of cess or fee for testing the coin paid:

HELD that he did not determine any question which amounted to a varying of the rent of the tenant.

Glover, J.—A PRELIMINARY objection has been taken by the special respondent's pleader that, under Section 102 Act VIII of 1869, Bengal Council, no appeal lies.

These suits are for arrears of rent, the landlord claiming Rs. 30-6-6, the tenant admitting a rental of Rs. 29-15. The Judge decided that, although Rs. 30-6-6 had for a great number of years been paid by the tenant, Rs. 29-15 only was paid as rent, the remainder being a kind of cess or fee for testing the coin paid. It is contended by the special appellant that this finding amounts to a varying of the rent of the tenant, and that therefore Section 102 does not apply.

It seems to me that the Judge did not determine any question which amounted to a varying of the tenant's rent. He admits that Rs. 30-6-6 were paid by the ryot, but he finds on the evidence that only Rs. 29-15 of that sum were paid as rent. The case reported at page 91 of the 19th Weekly Reporter does not seem to me to be in point. In that case there were various questions raised. One was as to the relationship of landlord and tenant existing between the parties, and the other as to the amount of rent which ought to be paid. The ryot there paid a certain sum as rent, the landlord claiming a larger amount. But in this case, as the Court below has found that the amount of rent claimed was the sum that had been paid by the ryot for a long series of years, and had never altered.

These cases seem to come exactly under the purview of Section 102 of the Rent Law, the amount sued for being under 100 rupees, and no question of right to enhance rent having been determined between the parties.

The special appeals must, therefore, be dismissed with costs.

The 18th July 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Decrees—Evidence.

Case No. 1350 of 1872.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 6th May 1872, affirming a decision of the Subordinate Judge of that district, dated the 27th May 1871.

Imdad Ali (Defendant) *Appellant,*

versus

Shaikh Booniad Ali and others (Plaintiffs)
Respondents.

Mr. C. Gregory for Appellant.

Baboo Romesh Chunder Mitter and
Moonshee Mahomed Yusoof for Respondents.

Decrees between parties may be most forcible evidence of title, but can scarcely be evidence of possession unless couched in a form which is declaratory of possession.

Phear, J.—ONE of the issues framed in the first Court between the plaintiff and the present appealing defendant was in these words :—

“Whether Mussamut Poochoo was malik of 5 annas and 13 gundahs, or of 4 annas and 13 gundahs share of kamut lands and garden.”

The first Court, rightly or wrongly, came to the conclusion on this issue that Mussamut Poochoo was malik of 5 annas 13 gundahs of the kamut lands and garden, and accordingly it gave a decree for that amount in favor of the plaintiff.

On appeal to the Judge, it was very strongly argued that the first Court had erred in declaring that Mussamut Poochoo was entitled to this extra anna of the garden and *Hame Farm*; that the Subordinate Judge had in fact “no right to decree to her heir possession in a share which had been finally decided in another case that it was not hers.” The Judge with respect to this says :—“I think however, notwithstanding the

"apparent cogency of the argument, that the Subordinate Judge was right. The question of the shares was not a point at issue in this case. The point to be decided was whether the deed of gift was genuine or not."

It is somewhat remarkable that the Judge should have overlooked the fourth issue which has just been quoted. It appears very clearly from that issue that the question as to the title of Mussamut Poochoo to this 1 anna was a point at issue in this case: it was also no doubt another question in the case whether the deed of gift was genuine or not. We think that the Judge ought to have tried the fourth issue raised in the first Court between the parties.

The Judge adds:—"It was for the Court to decree plaintiff's possession of whatever appeared to have been in the possession of the deceased lady at the time of her death. That this extra 1 anna portion of the *Hame Farm* and garden ceded to her under the ikrarnamah was still in her possession, is amply proved by the decrees of mesne profits obtained as late as "November 8th, 1869."

Now, if the Judge had directed his attention to the determination of the fourth issue between the parties, unquestionably the ikrarnamah which does not appear to have been disputed by the defendants, and the fact of possession by the deceased lady at the time of her death of the extra 1 anna, if that fact had been established, would together have afforded very strong evidence indeed of her title to the 1 anna. But it seems somewhat difficult to understand how the Judge arrived at the fact of this lady's possession of the 1 anna through the evidence afforded by the decrees for mesne profits. Decrees between the parties may no doubt be most forcible evidence of title, but can scarcely be evidence of possession unless they be couched in a form which is declaratory of possession. And we understand that this is not the case with these decrees. It appears further that some of these decrees at any rate are of a nature calculated to give rise to inferences adverse to the alleged title of the deceased lady.

On a full consideration of all the materials upon the record, such as ought to be given to them for the purpose of determining the fourth issue, these decrees as well as the ikrarnamah and the facts bearing upon possession will no doubt be found very valuable. It is not however for us to express any opinion as to

the effect of this evidence or any portion of it either one way or the other.

Also we think that the learned pleader for the appellant has failed to show any reason why we should interfere with any other portion of the judgments of the Courts below than that which bears upon the title of Mussamut Poochoo to this 1 anna.

Accordingly, we reverse the decisions of the Lower Appellate Court and of the first Court, so far only as they decree to the plaintiff this 1 anna share of the *Hame Farm* and garden, and remand the case to the Lower Appellate Court for trial of the fourth issue which was raised in the first Court.

Costs will abide the event.

The 19th July 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Payment to prevent Sale—Contribution.

Case No. 1682 of 1872.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 9th August 1872, reversing a decision of the Moonsiff of Kytee, dated the 14th March 1872.

Sharoda Koomaree Dossee and another
(Plaintiffs) *Appellants*,

versus

Mohinee Mohun Ghose and others
(Defendants) *Respondents*.

Baboo Romesh Chunder Mitter for
Appellants.

Baboo Nil Madhub Sen for *Respondents*.

Plaintiff's mother sued to recover a portion of a talook which she claimed under a will and which she would be entitled to upon the death of the widow of the deceased owner. While the suit was pending, the talook was put up for sale under Regulation VIII of 1819, and to prevent its being sold she paid the rent. The above suit abated by death of plaintiff's mother, and plaintiff now sues the shareholders to recover the amount paid to save the talook from sale:

Held that plaintiff's mother's interest in the talook was such as entitled the plaintiff to recover the money she paid.

Couch, C.J.—In this case, Mon Mohinee Dossee, the mother of the plaintiffs, had

brought a suit to recover a portion of the talook which she claimed to be entitled to under the provisions of a will, and which, whether she was entitled under the will or not, she would be entitled to as heir upon the death of the widow of the deceased owner Tinowree.

Whilst this suit was pending, the talook was put up for sale under Regulation VIII of 1819; and it was necessary, in order to prevent its being sold, that the rent of the whole should be paid. Accordingly, she paid the rent, and the plaintiffs now sue the different shareholders in the talook to recover the money she so paid.

The suit which she had brought has abated by her death, and the title which she set up in it under the provisions of the will remains undetermined. But treating her, as respects that, part of the case, as being only a claimant under a title which may or may not be good, she was at all events interested in the preservation of the tenure, as being entitled to succeed to it upon the death of the widow. We think that was such an interest as entitles the present plaintiffs to recover from the defendants the money which had been paid in discharge of the rent for which their property was liable, and for which it might have been sold.

The only question which appears to us to arise in this case is, whether the plaint in the present suit is so framed as to allow of effect being now given to this view of the case. In a special appeal, the Court not being able to find the facts, and not having, what a Court sitting in regular appeal may have by virtue of Section 37 of Act XXIII of 1861, the power of making amendments, is, according to the judgment of the Judicial Committee of the Privy Council in the well known case of *Eshan Chunder Singh vs. Shama Churn Bhutto** limited to founding its determination upon the case which is to be found in the pleadings, or involved in or consistent with the case thereby made. The case made in the pleadings here was substantially that the mother of the plaintiffs having an interest in the preservation of the property paid the money in order to prevent its being sold. We think the case now put forward is not inconsistent with the case which was made in the plaint, and it seems to us that this is a case in which we may properly give effect to the right which it is not disputed Mon Mohinee Dossee had. There is no question as to the nature of this

interest. The decree of the Lower Court which reversed the decree of the Court of first instance declaring the plaintiffs entitled to recover this money from the defendants is wrong and must be reversed, and the decree of the first Court must be restored. The appellants will have the costs in this Court and in the Lower Appellate Court.

The 18th June 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Decree for Kuboolent—Evidence.

Cases Nos. 33 to 35 of 1873.

Special Appeals from a decision passed by the Officiating Judge of Hooghly, dated the 19th September 1872, affirming a decision of the Moonsiff of Oolobouriah, dated the 30th May 1872.

Heera Lall Senl and others (Plaintiffs)
Appellants,

versus

Joheer Mollah and others (Defendants)
Respondents.

Baboo Ashootosh Dhur for Appellants.

*Baboo Mutty Lall Mookerjee for
Respondents.*

A decree for a kuboolent for arrears of rent is evidence of the rent which the judgment-debtor is liable to pay, only when he is called upon to execute such kuboolent; not where the decree has never been executed and no kuboolent has ever been given.

Jackson, J.—We think it unnecessary to determine the questions raised in this special appeal, although as at present advised we see no reason to suppose that the decision of the Court below is erroneous; but we abstain from doing so for this reason that in our opinion the plaintiff's suit ought to have been dismissed upon a different ground. He brought this action for arrears of rent upon the basis of decrees previously obtained by him against the defendant for kuboolent at the rate specified. Those decrees were obtained within a few days of the lapse of three years before the present suit was brought. The decrees were never executed. An application which we have no hesitation in describing as colorable was made for execution of the costs, and not for the actual enforcement of the decrees; but no execution took place;

* 6 W. R., P. C., p. 57.

no kubooleut has ever been given; and it appears that the defendant was never called upon to execute any. By the law a decree for kubooleut is evidence of the rent which the defendant is liable to pay only when he is called upon to execute such kubooleut, but refuses to do so. In this case, therefore, there was no other evidence of the defendant's liability to pay the rent sought. It must be added that the defendant has never paid or acknowledged his liability to pay one cowree of the rent to the plaintiff. The decrees for kubooleut, as well as the previous decree for resumption of the land, were obtained behind the back of the defendant. Whenever occasion arises to determine the validity of those decrees, it will then be necessary to settle finally whether the ground taken by the Lower Appellate Court in this case is correct.

The appeal No. 34 is dismissed with costs, and Nos. 33 and 35 without costs as the respondent does not appear.

The 19th June 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Guardian—Manager—Minor.

Case No. 101 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 30th September 1872, reversing a decision of the Moonsiff of Oolobouriah, dated the 29th February 1872.

Prosunno Coomar Ghuttuck (Plaintiff)
Appellant,

versus

Wooma Churn Mookerjee (Defendant)
Respondent.

Baboos Sreenath Doss and Bhugobutty Churn Ghose for Appellant.

Baboo Ashootosh Dhur for Respondent.

The guardian of a minor, as manager of the minor's estate, is bound in duty to abstain from entering into any arrangement beneficial to himself and detrimental to the estate; and if any such arrangement has been entered into, it is incumbent on him, immediately after the minor comes of age, to obtain from him not an accidental but a distinct formal ratification.

Jackson, J.—It appears to us that, by the erroneous decision of the Judge in this case

reversing the decree of the Moonsiff, the defendant has obtained a decision to which he is by no means entitled. It seems that the defendant was the guardian and manager in fact and in reality, if not so constituted under the law, to plaintiff during the minority of the latter; and while he was such guardian, he obtained for himself a grant of a mokururee nature of some land belonging to the plaintiff to which he obtained the signature of plaintiff's mother. The plaintiff's story is that, after he had obtained his majority, in seeking to get possession of the property, he was opposed by the defendant who set up the mokururee lease.

The Moonsiff decided in favor of the plaintiff.

The Judge takes into consideration the evidence in favor of the execution of the pottah which he deems to be exceedingly suspicious in itself, but he adverts to other circumstances which he considers as corroborative of the pottah having been given; and in that view he reverses the judgment of the first Court and dismisses the plaintiff's suit. The Judge refers in particular to the testimony of the witness Raj Kristo, who is the nephew of the plaintiff's gomashtah, and who acted for him for some time. This witness deposed to the fact that he collected rent from the defendant, but he could not and did not say that the rent he received was in respect of this mokururee, and he altogether denied the genuineness of the receipt which the defendant produced purporting to have been given by him. Now this evidence, even if it were in favor of the defendant as the Judge supposes it to be, would be of very little consequence. A ryot is also called who is said to have been produced by the defendant, but who is in reality produced by the plaintiff, and the Judge in that mistaken view misrepresents the effect of that evidence. Then it is alleged that the defendant obtained from the plaintiff a ratification, after he came of age, of this pottah. That ratification consists of a recital upon the back of a kistbundee in which credit is given to plaintiff for a sum described as *khajamah* or rent, which is said to correspond exactly with the rent of the mokururee; but the plaintiff gives an entirely different account of this item and states that it refers to some money paid to the defendant by persons who owed rent to plaintiff. The fact, however, is that in dealing with this case, the Judge has wholly overlooked the most material circumstance of all, which is

that the defendant in the fiduciary position in which he stood to the plaintiff was bound in duty to abstain from entering into any arrangement beneficial to himself and detrimental to the plaintiff's estate; and if any such arrangement had been entered into, it was incumbent on defendant, immediately after the plaintiff came of age, to obtain from him not an accidental but a distinct formal ratification. It is not pretended that this was done in this case. The circumstance that the defendant brought the plaintiff in as a debtor shortly after he came of age, so that it was necessary to execute a kistbundee in his favor, is a circumstance which it appears to us makes the case worse on defendant's part. It is not suggested that there was any thing in the plaintiff's circumstance which called for such sacrifice of his interest in the future as was involved in the giving of that mokurree. There is nothing to show under what circumstances it was given, and whether it was advantageous or otherwise to plaintiff. Looking to the relation in which the defendant stood to the plaintiff and the whole circumstances of the case, it seems to us that the Judge was in error in reversing the decision of the Moonsiff, and that we must set the matter right by reversing the judgment of the Judge and restoring that of the Moonsiff with costs.

The 26th June 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Putnee—Division.

Case No. 406 of 1873.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 2nd September 1872, reversing a decision of the Subordinate Judge of that District, dated the 27th January 1871.

Monomothonath Dey and another (Plaintiffs)
Appellants,

versus

Mr. G. Glascott (Defendant) *Respondent.*

Baboo Rajendro Nath Bose for
Appellants.

Mr. R. T. Allan and Baboo Ashootosh
Dhur for Respondent.

Where one individual holds a putnee by paying rent in equal shares to two owners of the zemindaree, the

division is the joint act of the putneedar and the zemindars, and is as if each of the zemindars had granted to the same person his share in putnee.

Jackson, J.—THE question arising here is what is the effect as to encumbrances on inferior tenures of the sale purporting to be under Regulation VIII of 1819 of a portion of a putnee tenure. This is a question which in relation to the present suit was raised for the first time in the Lower Appellate Court, and the Judge determined the appeal on that question alone and reversed the judgment of the Court below dismissing the plaintiff's suit with all costs. In doing so, the Judge followed the decision of this Court reported in XV Weekly Reporter, page 446, in which case a further judgment on application for review was delivered by Mr. Justice Loch and which is reported in XVII Weekly Reporter, page 182. The decision in that case undoubtedly was to the effect that the law sanctioned only the sale of an entire tenure, and not part of a tenure; and the reason why such sale alone was contemplated by the Legislature was suggested in that judgment; and what makes that decision specially applicable to the present case is that it happened to have been given in a matter relating to the other half of the putnee to which the present suit relates. It appears to us that there are two points of view in which this question may be regarded;—one as it relates to a sale which creates or purports to create a division of a putnee tenure;—and the other as it relates to a sale which merely recognizes and follows existing facts, a division of the tenure having already taken place. It is stated before us to-day that in regard to the particular putnee tenure before us, a division of that which was originally a putnee of 8 annas had long before taken place with the sanction of the zemindars, and that they enjoyed severally their two distinct putnees of 4 annas each, and accordingly the two portions were sold one after the other on the same day. Now it seems that the putneedar was one individual who held his putnee by paying rent in equal shares of 4 annas each to the two owners of the zemindaree. In this manner the division of the putnee was the joint act of the putneedar and the zemindars and was as if each of the zemindars had granted to the same person his 4 annas share in putnee. In this state of things, it appears to us that questions might arise which are not fully considered in the judgment cited by the Court below, and inasmuch as the facts which we have just stated as

suggested to-day were not in evidence and could not have been in evidence because the question was not raised in the Court of first instance, it seems to us necessary that the judgment of the Lower Appellate Court should be set aside and the case go back before the Court of first instance in order that issues of fact and of law may be framed on this point and decided. The costs of this appeal will abide the result.

The 26th June 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock,
Sir Montague E. Smith, Sir Robert P.
Collier, and Sir Lawrence Peel.

*Alluvion—Proprietary Rights—Regulation X of
1825 s. 4.*

Case No. 40 of 1869.

*On Appeal from the High Court of Judi-
cature at Fort William in Bengal.**

Ranee Surnomoyee

versus

Jardine, Skinner and Co. and others.

Case No. 44 of 1870.

Ranee Surnomoyee

versus

Robert Watson and Co.

Though an island, or land thrown up and surrounded by a river, may become vested in Government under the provisions of Regulation XI of 1825 s. 4 cl. 4, it does not follow that, if the river which separates the island from the main land dries up after the island has been resumed by Government, the bed of the river becomes the property of Government in cases in which the bed of the river is not gained as an accretion to the island by gradual accession within the meaning of cl. 1.

THESE appeals, which were consolidated and have been heard together, arose out of four suits instituted by the plaintiff; two of them against Messrs. Jardine, Skinner and Co. and others, and two against Messrs. Robert Watson and Co.

One of the suits against Messrs. Jardine, Skinner and Co., No. 87 of 1866, was to recover possession of 2,428 beegahs 6 cottahs

and 4 gundahs of land, claimed by the plaintiff as a part of a khas mehal, called Chur Doomreah Jazeerah, No. 560 on the rent-roll of the Collectorate of Moorsshedabad, purchased by her at a Government sale in the year 1864, and also to set aside an order of the Joint Magistrate, made on the 14th October 1865, under Section 318 of the Code of Criminal Procedure, for maintaining the defendants in possession of a portion of the said lands.

The other suit against Messrs. Jardine, Skinner and Co., No. 88 of 1866 (Record, page 955), was to recover damages for crops alleged to have been sown by the plaintiff on 1,918 beegahs of the said lands, and to have been wrongfully taken possession of by the defendants.

The two suits against Messrs. Robert Watson and Co. were similar to those against Messrs. Jardine, Skinner and Co., No. 86 of 1866, being to recover possession of 752 beegahs of other land, alleged by the plaintiff to be a portion of the same khas mehal, and also to set aside an order of the Joint Magistrate, made on the 21st of December 1865, for maintaining the defendants in possession of the said land; and the other of the said suits, No. 89 of 1866 (Record, page 133), being to recover damages in respect of the crops alleged to have been sown by the plaintiff on 569 beegahs of the said land and to have been wrongfully taken possession of by the defendants.

The lands which form the subject of these appeals, so far as they relate to the suits numbered 86 and 87 of 1866, are portions of the dried-up bed of the River Pudma, and the main question to be considered is, did they form any part of the khas mehal Chur Jazeerah Doomreah purchased by the plaintiff from Government.

The principle upon which the High Court acted in the two suits for possession was to exclude from the decrees in favor of the plaintiff all the lands which formed the bed of the river, and were not included in the measurement made by Bissonath Dutt, prior to the ijarah granted to Mr. Dalrymple (see page 977). Their Lordships are of opinion that the High Court was right in acting upon that principle.

If the lands in dispute had been annexed by gradual accretion to the estate granted by the ijarah to Mr. Dalrymple, they would, by virtue of the Bengal Regulation II of 1825, have become part of his tenure, and would have passed to the plaintiff under her

* From the judgment of Loch and Mitter, JJ., decided 12th and 30th April 1869.

purchase of the khas mehal. But it was held by the High Court that the lands were not gained or annexed to the island by gradual accretion caused by the recess of a river, but consisted of the dried-up bed of the river which formerly flowed to the south of the island, and which gradually dried up, in consequence of its having become closed at the east and west ends thereof. Their Lordships concur in that view. Indeed, it was scarcely contended by the learned Counsel for the appellant that the land was gained by gradual accession to the island by the recess of the river.

The plaintiff must recover upon the strength of her own title, and cannot turn the defendants out of possession upon the ground that they have failed to prove their title.

The Government survey of Mouzah Chur Jazeerah Doomreah, made in 1853, included not only the land, but the river on the south of the island; and on the map the southern bank of the river was shown as the northern boundary of the zemindaries to the south, and the whole of the mouzah was stated at the foot of the map to be "No. 306 of the former, and No. 560 of the present, Chur Jazeerah." In the same statement, however, the quantity of land included in the mouzah was represented to be 28,974 odd beegahs.

It was contended that the map of 1853 proves that that part of the bed of the river, which was then covered with water and has since dried up and now forms the lands in dispute, formed part of the khas mehal Chur Jazeerah Doomreah purchased by the plaintiff. It is clear, however, that the lands in dispute in this appeal were not included in the survey or measurement made by Bissonath Dutt prior to the renewal of the ijarah to Mr. Dalrymple on the 29th April 1856.

Their Lordships have already held,* in appeal No. 16 of 1868, that nothing was sold to or purchased by the plaintiff beyond what was included in the ijarah granted to Mr. Dalrymple on the 29th April 1856, at the sudder jumma or annual revenue of Rs. 2,409-13-11, the amount stated in the certificate of sale to the plaintiff. Acting upon that principle their Lordships held in that appeal that the 15,000 beegahs to the east of the Chilmaree Dara, and which formed part of the 28,974 beegahs included in the map of 1853, and were claimed by the plaintiff in her suit No. 89 of 1866 against the present defendants, formed no part of the khas mehal purchased by the plaintiff.

* *Ante*, 211.

The opinion expressed by the High Court is in entire accordance with the view taken by their Lordships in that case.

The argument of the High Court, with reference to the survey map of 1853, appears to their Lordships to be unanswerable. They say (page 950):—

"There can be no doubt that the lands in dispute were thacked, or surveyed, in 1853 as within the boundary of Jazeerah Doomreah; but it may be observed that that survey included not only those lands, but also a large chur to the eastward, and separated from Doomreah by a running stream as part of the Jazeerah. This chur clearly formed no part of the lands settled with Mr. Dalrymple in 1855; and by a judgment of this Court, dated 11th February 1868, reported in IX W. R., page 259, it has been definitely settled that it was not included in the plaintiff's purchase, and that she had no claim to that land. So in the present case it is evident that, though at the time of the survey the bed of the river was included within the boundary of the Jazeerah, yet, when the subsequent survey was made by Bissonath Ameen, on whose inquiry the settlement was made, the bed of the river, though partly dried up and in the possession of the defendants, was excluded from that settlement; so that there is no better reason to conclude that these lands are part of the island, on the ground that they have been surveyed as part of it, than there was in the other case."

The judgment to which reference has been made by the High Court in the passage above quoted, is that which formed the subject of the appeal to Her Majesty in Council, No. 16 of 1868,* and in which their Lordships have already expressed their entire concurrence.

It appears that, in point of fact, a portion of the bed of the river which had dried up before Bissonath Dutt's survey was included in his measurement; but that does not affect the argument of the High Court as to that portion of it that had not then dried up and was not included in his survey or field-book.

Their Lordships remark that in these suits, as in the suit in which Appeal No. 16 of 1868 was preferred, the khas mehal held by Mr. Dalrymple under the ijarah, and the mehal which the plaintiff purchased, are shown by the plaint to be identical. The plaintiff says:—"During the khas possession by Government, defendants held the said mehal on an ijarah settlement. The term

* *Ante*, 211.

of the *ijarah* settlement expired on the 30th April 1865" (Plaint, Record, page 1).

The island itself, as appears from the proceeding of Mr. Toogood (page 123 of the Record, in Appeal No. 16 of 1868) was resumed by Government under the provisions of Regulation XI of 1825 Section 4 Clause 4. That Section, however, vested in the Government only the island which was thrown up, or, in other words, the land surrounded by water, and not the unfordable channel of the river by which the island was formed. Though an island, or land thrown up and surrounded by a river, may be vested in Government, it does not follow that, if the river which separates the island from the main land dries up after the island has been resumed by Government, the bed of the river becomes the property of Government in cases in which the bed of the river is not gained as an accretion to the island by gradual accession within the meaning of the first Clause of Section 4 of Regulation XI of 1825.

Their Lordships have not sufficient materials before them to enable them to determine whether that portion of the bed of the river which was covered with water and was not included as part of the *khas mehal* granted by the *ijarah* to Mr. Dalrymple, became the property of Government upon its subsequently drying up. Nor is it necessary to do so for the purpose of these appeals, for in the opinion of their Lordships it was not included in the sale to the plaintiff.

It was, however, contended that the bed of the river was included in the *ijarah* to Mr. Dalrymple, and was part of the *khas mehal* sold to the plaintiff. It was argued that the words of the *ijarah*, "You are entitled to the revenue which you will be able to assess on the waste lands of the said *mehal* up to the end of the period of the *ijarah*," were sufficient to entitle Mr. Dalrymple to the waste land subsequently formed by the drying up of that portion of the river which was not included in Bissonath Dutt's survey of the *khas mehal*.

*Their Lordships cannot assent to that view of the case, for, at the time of Bissonath Dutt's survey and measurement, that part of the bed of the river which has since dried up and is now in dispute was under water, and no part of the revenue of Rs. 2,409 reserved in the *ijarah* to Mr. Dalrymple, and in the sale to the plaintiff, was calculated or assessed in respect of it.

The quantity of land in dispute in the suits under appeal is, no doubt, very much less than the 15,000 beegahs which were the subject of the decree from which the appeal No. 16 of 1868 was preferred. But the construction of the *ijarah* to Mr. Dalrymple, and of the sale to the plaintiff, cannot depend upon the quantity of the land claimed in excess of Bissonath Dutt's measurement. Even if the bed of the river upon its drying up became the property of Government, a point upon which their Lordships are unable upon the evidence in the cause to form an opinion, it would be an innovation in the manner of construing grants of this nature to hold that that part of the bed of the river which was not in the possession of Government, and had not even been resumed or assessed to the Government revenue, and was not included in the survey and measurement made preparatory to the grant of the *ijarah*, was intended to be included in the *ijarah* or in the sale of the *khas mehal*, under each of which the revenue reserved was fixed upon the basis of the survey.

It should be remarked that the words of the *ijarah* are "the waste lands of the said *mehal*." Those words cannot include waste lands which were no part of the *mehal* and were excluded from the survey measurement and report upon which the revenue settlement was made. It must be borne in mind, as remarked by their Lordships in Appeal No. 16 of 1868, that what was granted in *ijarah* to Mr. Dalrymple, and what was sold to the plaintiff, was a *khas mehal*, a term which could not include lands which had never been in the possession of Government, or ever resumed or included in the estate which was assessed to the public revenue.

The proceedings of Mr. Toogood, and the field-book of Bissonath Dutt, contain a complete description of the lands included in the *khas mehal*. The proceedings are headed "particulars of the origin and reason of the settlement of, and the right which the Government has, in the said *mehal*" (page 124 of the Record, in Appeal No. 16 of 1868). They contain a description of the lands of the *mehal*, and amongst other things, a statement of lands at present not fit to pay, &c.; and under this head there is the following statement:—

"Within this *mehal* there are beegahs 120-6-0-16½ gundahs of road land, and beegahs 372-12-0-3¾ gundahs of sandy unculturable waste lands, and beegahs 255-8-0-7¼

of unculturable land covered with water; in all beegahs 748-7-0-17 $\frac{1}{2}$ gundahs of land on which no rent has been assessed, the reason being that those lands are not fit to be assessed" (pages 126 and 128 of same Record).

Those 748 odd beegahs were included in the 11,381 odd beegahs upon which the annual revenue of Rs. 2,409-13-11 was assessed; and are sufficient to satisfy the words "the waste lands of the mehal" as used in the *ijarah*, by the terms of which Mr. Dalrymple was to have the benefit of all waste lands included in the estate which was assessed and granted to him in the same manner as every *zemindar* under the permanent settlement has the benefit, without any increase of revenue, of all waste lands which at the time of the settlement were included as part of the *zemindari*.

The proceedings then contain a statement of the rates prevalent in the mehal for each description of land (page 126), a statement of the various descriptions of cultivators, and finally, under heading No. 2, a statement of the *jummabundee*, according to the rates recommended by the Ameen, and the particulars thereof, showing the description, quality, quantity, rate of assessment and amounts of *jumma* in respect of all the lands in the mehal, giving a total of 10,632 odd beegahs, assessed at a gross *jumma* of 2,667 odd Rs. and 748 beegahs of land unculturable, and not fit to pay, making a grand total of 11,381 odd beegahs of land included in the mehal. The field-book of Bissonath Dutt gives the particulars of each *dag* in the mehal, and of the quantity and quality of land contained in it, and the name of the occupier.

The result of the proceedings before Mr. Toogood appears from the following passage in his Report, page 125. Referring to the Report of Bissonath Dutt, he says:—

"From the papers filed by the Ameen it appears that the said Ameen, having measured beegahs 11,381-6-12 $\frac{1}{2}$ of land, and fixed Rs. 2,677-10-1 as the *hustabood jumma* thereof, filed the papers accordingly. Hence it is deemed proper to enter into an *ijarah* settlement with Mr. Dalrymple, the former *ijaradar*, for a term of ten years, commencing from the 1st of May 1855, at an annual rental of Rs. 2,409-13-11, being the balance, after deducting Rs. 267-12-2 on account of collection of charges, at the rate of 10 per cent. on the said *jumma* (*hustabood*)."

The proceedings were forwarded to the Commissioner of Revenue for his orders

(page 129), and on the 15th March 1856, an order was made by the Commissioner to the effect that the said *ijarah* settlement, for a term of ten years, from the 1st May 1855, at an annual rental of Rs. 2,409-13-11, should be entered into with Mr. Dalrymple. The *ijarah* was accordingly granted, and shortly before its expiration the *khass mehal* was sold to the plaintiff, subject to a revenue of Rs. 2,409-13-11, the same amount as that reserved in the *ijarah*. The document signed by the plaintiff upon her purchase of the mehal stated the quantity of land in the mehal to be 10,377 odd beegahs, the same as in the measurement of Bissonath Dutt. (See No. 11, Supplemental Record in 162, 1868, page 8).

It cannot be disputed that the plaintiff has got possession of the 10,377 beegahs of cultivable land, and the other lands, making up 11,381 beegahs, included in Bissonath Dutt's survey and field-book; but she claims, in addition, that part of the bed of the river which was not included in Bissonath Dutt's survey, but was at the time of that survey covered with water, and has since dried up.

In support of the argument that the plaintiff is entitled to those lands, it is said that part of the bed of the river, which dried up after the first *ijarah* to Mr. Dalrymple, was included in Bissonath Dutt's survey and measurement in the second *ijarah* to Mr. Dalrymple. That is so. But there is a great distinction between that part of the bed of the river which was included in the second *ijarah* to Mr. Dalrymple and that part which has since dried up and is the subject of the present appeals. The former portion was resumed by Government, and whether they were in strictness entitled to it or not, it was included in the revenue settlement, treated as part of the *khass mehal*, and included in the second *ijarah* to Mr. Dalrymple; whereas the land now in dispute, being that part of the bed of the river which dried up after Bissonath Dutt's survey, has never been resumed by Government, or assessed to the public revenue, and has never been included in the *khass mehal*. Whether Government was entitled to resume that part of the bed of the river which was included in the second *ijarah* to Mr. Dalrymple, is not a question in the present appeal. The plaintiff is in possession of it, and her title to it is not disputed in the suits under appeal. As to the lands in dispute, she is not in possession of them; she seeks to turn out the defendants who are in possession of them, and she has therefore to prove that

they were the property of Government, and were included in the sale to her. In both of these respects she has failed to make out her case.

It was contended on behalf of the plaintiff that even if the land in dispute was not part of the khas mehal, either originally or as an accretion to the island, within the meaning of Regulation XI of 1825, she was still entitled to it upon the general principles of equity and justice according to the provisions of Clause 5 Section 4 Regulation XI of 1825.

It appears to their Lordships that the land in dispute was not gained by alluvion or dereliction of a river within the meaning of that Clause. Furthermore, the plaintiff did not, in her plaint, rest her case upon the provisions of that Section, or upon the general principles of equity and justice. Her claim was based upon an alleged title to the land as part of the khas mehal purchased by her from Government, of which, after the expiration of Mr. Dalrymple's ijarah, she had obtained actual possession, and from which she had been afterwards ousted by the defendants. But even if she were entitled to rely upon the 5th Clause of Section 4 of the Regulation above referred to, their Lordships fail to discover upon the facts disclosed any general principles of equity or justice in her favor.

As to the suits for damage to the crops, it is clear that the plaintiff must fail as to the crops alleged to have been sown upon that portion of the lands in dispute to which she has failed to prove title. As to the crops alleged to have been sown upon the lands in respect of which decrees have been given in her favor in suits Nos. 86 and 87 of 1866, their Lordships concur in the view taken by the High Court. The suit is founded upon an assumed possession and actual ouster; but the plaintiff has failed to prove that she was in possession of the land when she sowed the crops, and that defendants ousted her from possession as alleged in her plaint; on the contrary, it appears that the defendants were then in possession of the lands.

It becomes unnecessary, therefore, to consider upon what portion of the lands in respect of which the plaintiff has succeeded crops sown by the plaintiff were destroyed or appropriated by the defendants, or what was the value of such crops. This decision will not prejudice the plaintiff's right, if she has any, to sue for the mesne profits of the lands to which she has established her title, and for which she has obtained decrees in

the Lower Courts. The result is that their Lordships will humbly recommend Her Majesty to affirm the decisions of the High Court with the costs of these appeals.

The 10th July 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Execution—Representatives of Judgment-debtor—
Act VIII of 1859 ss. 210, 211, & 246—
Act XXIII of 1861 s. 11.

Case No. 89 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Backergunge, dated the 28th February 1873.

Ameeroonnissa Khatoon (Judgment-debtor)
Appellant,

versus

Meer Mahomed Mozuffur Hossein Chowdhry
(Decree-holder) *Respondent.*

Baboos Romesh Chunder Mitter and Nullit Chunder Sen for Appellant.

Mr. J. T. Woodroffe and Baboos Kalee Mohun Doss, Doorga Mohun Doss, and Kashee Kant Sen for Respondent.

Cases Nos. 118 and 124 of 1873.

Miscellaneous Appeals from the orders passed by the Officiating Judge of Dacca, dated respectively the 28th December 1872 and 18th of March 1873.

Meer Mahomed Mozuffur Hossein Chowdhry and others (Decree-holders) *Appellants,*

versus

Ameeroonnissa Khatoon and others
(Judgment-debtors) *Respondents.*

Baboos Doorga Mohun Doss and Kashee Kant Sen for Appellants.

Baboo Sreenath Banerjee for Respondents.

Where application is made to execute a decree originally obtained against A, against B as one of the legal representatives of A deceased, and such application is based, as it must be, upon the ground that B is in possession of property belonging to the estate of A, which property the Court is asked to attach with a view to sale, B's answer to that application being that she holds the property not as the representative of A but in her own right, such answer cannot be termed a setting-up of a claim under Act VIII of 1859 s. 246; but it is an

answer to an application made under ss. 210 and 211, and the case comes under the terms of Act XXIII of 1861 s. 11.

Where a suit is brought under s. 203 Act VIII of 1859 against the representatives of a deceased person, the defendant need not be sued in any "capacity," but should be described as stated in s. 26; and the plaintiff should contain an allegation that he is the representative of such deceased person.

Jackson, J.—THE appellant in this case, Mussamut Ameeroonnissa Khatoon, is the widow and one of the representatives of Moulvie Abdool Ali, deceased. The respondents, Meer Mafomed Mozuffer Hossein and others, had brought a suit and obtained a decree against Abdool Ali, against which decree an appeal was preferred to Her Majesty in Council, and Abdool Ali having in the mean time died Ameeroonnissa came on the record as a defendant, but the original decision was affirmed. The plaintiffs now seek to execute their decree by attaching the immoveable property in the possession of Ameeroonnissa and others, and thereupon Ameeroonnissa represented to the Court that she was in possession of such immoveable property, not as representative to the deceased Abdool Ali, but in her own right. This objection or plea of Ameeroonnissa's appears to have been dealt with by the Court below, as indeed it seems to have been regarded by all parties, as a question arising under Section 246 of the Civil Procedure Code, and the Subordinate Judge in dealing with it observes:—"In summary cases it is unnecessary to observe anything as regards the invalidity of the documents filed by the objector. It is only necessary to determine possession by right of inheritance, which under the circumstances of this case and case No. 82 mentioned above, is proved, that is, the claimant objector holds possession over the said properties by right of inheritance from Moulvie Abdool Ali, deceased, judgment-debtor." That looks very much like trying one side of the case and refusing to try the other. Ameeroonnissa now appeals to this Court on the ground that her objection has not been tried out. Mr. Woodroffe, who appears for the respondents, contends that this being a decision on a claim under Section 246, the order of the Court below is not subject to appeal, but the party aggrieved is at liberty to bring a suit to establish her right. Several cases have been cited to us in which unquestionably this view of the case has been taken; notably a case in VI Weekly Reporter, page 61, Miscellaneous Rulings; one in X Weekly Reporter, page 199; one in XII Weekly

Reporter, page 333; two in XV Weekly Reporter, pages 163, 339. The leading case, so far as report is concerned on the point is that in II Bengal Law Reports, page 73, Full Bench,* being the case of Shaikh Wahid Ali against Mussamut Jumai. In that case, where a suit had been brought by the party complaining of the wrongful sale of a property belonging to her and in her possession under the circumstances contemplated in Section 246, the plaintiff Mussamut Jumai having been the representative of the original debtor but claiming to hold the land in dispute in her own right, the Chief Justice with the concurrence of the majority of the Court held that the suit would lie, and that in a certain sense Mussamut Jumai had not been a party to the original suit. It appears to us that in all those cases some confusion and a great deal of refining has arisen out of the curious practice in the Mofussil of suing a defendant in some "capacity" as it is called. The Civil Procedure Code in Section 26 prescribes that amongst the particulars which a plaintiff is to contain are the name, description and place of abode of the defendant, and in the body of the plaint the circumstances out of which the liability of the defendant is to be established must be set forth. It seems to us very inconvenient that the defendant should be described as holding some capacity. Where a suit is brought under Section 203 of the Procedure Code against the representative of a deceased person, it seems to us that the defendant should be described as stated in Section 26, and the plaintiff should contain an allegation that he is the representative of such a deceased person and the suit is brought against him as defendant on that account, and if the particulars in the plaint are made out a decree will pass against him under Section 203.

Section 210 provides—"If any person against whom a decree has been made shall die before execution has been fully had thereon, application for execution thereof may be made against the legal representative or the estate of the person so dying as aforesaid." And Section 211 says:—"If the decree be ordered to be executed against the legal representative, it shall be executed in the manner provided in Section 203 for the execution of a decree for money to be paid out of the property of a deceased person."

It seems to us that the present case is one

* 11 W. R., F. B., 1.

falling precisely under those terms. It was sought to execute the decree originally obtained against Abdool Ali against Ameeroonnissa as one of his legal representatives, and such application was and must have been based upon the ground that Ameeroonnissa was in possession of property belonging to the estate of Abdool Ali, which property accordingly the Court was asked to attach with a view to sale. Ameeroonnissa's answer to that application being that she held that property, not as the legal representative of Abdool Ali but in her own right, it appears to us that that has been mistakenly termed a setting up of a claim under Section 246, whereas it was in reality the answer of Ameeroonnissa to the execution creditor's application. This being a view different from that taken in previous cases by this Court, we should have been under the necessity of referring the matter to a Full Bench if it were not for the decision of the Judicial Committee in the very case of Wahed Ali against Mussamat Jumai, in which an appeal was made against the judgment of the Full Bench already referred to, and a report of which decision is to be found in XVIII Weekly Reporter, page 185.

In that judgment their Lordships say that "they are unable to assent to some of the reasons on which the High Court have founded their judgment." They proceed:—"It is obvious, therefore, that a party in a representative character is so distinctly a party to the suit that under certain conditions his own private property may be attached and sold. It is true that to fix him with this liability it must be shown that he had received property of the deceased of which he has failed to prove a proper disposition. But these things are all cognizable and proper to be ascertained in the suit in which the decree is made during the progress of the execution proceedings founded upon such decree;"—and we should mention it appears to us that they should be ascertained directly under application under Sections 210 and 211.

Their Lordships then intimate that they would not have upheld the judgment of the High Court if it rested upon such a ground alone, but that they consider there are other grounds upon which the judgment can be supported, and they proceed to state what those were. The learned Counsel for the respondent represented to us that in these circumstances the observations of their Lordships in the Judicial Committee as to whether a party in a representative character is a party to the suit ought to be dealt with

as *obiter dicta*, and he stated that the Lords of the Judicial Committee themselves have intimated that they do not desire that any observations thrown out by them in the course of judgment in regard to matters which are not necessary for the decision of the case in which that judgment is given should be used as authoritative opinions. We can only say that we should have some hesitation in so dealing with observations deliberately made by their Lordships on a point directly arising in the case, though not perhaps necessary to the decision. It appears to us that in that particular case the Judicial Committee had absolutely declared that the judgment of the High Court could not have been supported but for other facts which they proceeded to state. Be that as it may, we think at least the expression of opinion by the Judicial Committee does so far relieve us from the weight of authority of previous decisions of this Court that we venture to act upon our own view in this case. We have said that this case appears to us to come under Sections 210 and 211. Another reason which makes us think that the case is not one under Section 246 is that the first sentence of that Section appears to exclude such a case as this. It says:—"In the event of any claim being preferred to or objection offered against the sale of lands or any other immoveable or moveable property which may have been attached in execution of a decree or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding Section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in Section 220." Surely that Section could never have been intended to apply to cases in which the objector was the original defendant. That seems to show, we think conclusively, that where a party claiming in her own right, although sued in a representative capacity as it is called, has had a decree passed against her under Section 203, in that case any objection of her in her personal right to the property could not be dealt with under Section 246. As the proceedings under Sections 210 and 211 are to be dealt with in the same manner as those under Section 203, it appears to us that the same principle applies. That being so, the

case appears to come clearly under the terms of Section 11 Act XXIII of 1861, and to be one of those questions between the parties to the suit and relating to the execution of decree which are to be determined by the Court executing the decree and which are not to be the subject of a regular suit. It may be said that a claimant under Section 246 sets up an affirmative case, while a judgment-debtor under Section 203 or Section 210 sets up a negative case; but this is a shadow and does not affect the real substance of the matter. We think, therefore, that in this case an appeal lies, and if an appeal lies we must consider whether the matter has been properly dealt with by the Court below. It appears to us that it has not been so dealt with; that the real issue in the case has been misconceived; and that the Subordinate Judge has declined to enter into the evidence which was quite material on the subject to be decided. We think the best course would be to frame the proper issues ourselves and send to the Lower Court for finding thereupon. Accordingly we frame the following issue:—Whether the property which has been attached and which is admittedly in the possession of the appellant is a property which came into her possession as part of the estate of the deceased Abdool Ali. On this issue the parties will be at liberty to offer any evidence they think fit.

It is admitted that miscellaneous appeals Nos. 118 and 124 will be governed by this decision. All these three cases, therefore, Nos. 89, 118 and 124 are remanded to the Judge of Dacca for trial.

The 19th July 1873.

Present:

The Hon'ble F. A. Glover, *Judge.*

User—Rights of Way and Water—Act IX of 1871 s. 27—Limitation.

Case No. 10 of 1873.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 6th. September 1872, reversing a decision of the Moonsiff of Sonamookhee, dated the 13th January 1872.

Juggessur Singh and another (Plaintiffs)
Appellants,

versus

Nund Lall Singh and others (Defendants)
Respondents.

Baboo Bama Churn Banerjee for Appellants.

Baboo Nil Madhub Sen for Respondents.

Twenty years of peaceable and open enjoyment without interruption are needed to make a right of user absolute, whether it be a right of way or right of water.

Should obstruction be offered within the 20 years, a suit to recover the right of user must be instituted within 2 years after the last act of user.

Glover, J.—THE Judge has found as a fact that the plaintiff had no user of the water since 1275 B.S., and that he was therefore barred by Section 27 Act IX of 1871, the present suit not having been brought till 1878 B.S., or more than two years after.

The special appellant contends that the suit could not be brought any time within two years of the obstruction of the right of user by the defendant, and that the right to use the water of the tank was necessarily periodical, and not continuous.

I think that the plaintiff has lost his right. Section 27 makes no difference between rights of way and rights of water; both must be peaceably and openly enjoyed for a period of twenty years without interruption in order to make the right of user absolute. The interruption referred to must have occurred within the 20 years, and must be an obstruction by the act of some person other than the claimant.

In this case the obstruction complained of took place in 1278, or more than two years after the last act of user on the part of the plaintiff, and when according to the Section he had no right of user left which could be obstructed.

The illustration (b) to Section 27 shows the meaning of the law to be that there must be an exercise of the right by actual user within two years next before the institution of a suit for recovery.

Schedule 2 of the Limitation Act merely refers to the date of the cause of action supposing an obstruction to have been caused during the 20 years' user.

The appeal is dismissed with costs.

The 19th July 1873.

Present :

The Hon'ble F. A. Glover and E. G. Birch,
Judges.

*Review Proprio Motu—Jurisdiction—Act VIII
of 1859 s. 376—Ex Parte Decrees.*

Case No. 1534 of 1872.

*Special Appeal from a decision passed by
the Subordinate Judge of Beerbhoom,
dated the 16th August 1872, reversing
a decision of the Moonsiff of Kandra,
dated the 11th June 1872.*

Poresh Nath Mundul (Defendant) *Appellant,*

versus

Khettro Monee Debia and another (Plaintiffs)
Respondents.

*Baboos Mohinee Mohun Roy and Bipro
Doss Mookerjee for Appellant.*

Baboo Kalee Prosunno Dutt for Respondents.

Without an application being made for review, a Judge has no power *proprio motu* to alter or amend his own judgment.

An *ex parte* decree is open to review in the same manner as other decrees under Act VIII of 1859 s. 376.

Glover, J.—THE plaintiff in this case sued the defendant for arrears of rent, and also to have it declared that in consequence of those arrears the tenure was cancelled and the tenant liable to ejectment. The defendant did not appear, and the plaintiff got a decree *ex parte*.

Within the thirty days allowed by law the defendant appeared and applied under Section 119 of the Procedure Code for a rehearing. The Moonsiff refused this, being of opinion that the defendant had had due notice of summons; but at the same time he, the Moonsiff, discovered that so much of the *ex parte* decree as allowed ejectment and cancelment of the tenure was illegal, and this part of his order he in consequence reviewed (after serving notice on the opposite party) and eventually set aside.

The Subordinate Judge, on appeal, held that the Moonsiff had exceeded his powers in doing this, and it is on this point that the special appeal comes before us.

I do not doubt but that Section 119 is final so far as regards the special question with which that Section deals, or that a defendant against whom an *ex parte* decree

has been given, if he fail to prove that no summons was served upon him, or that he was prevented by any sufficient cause from appearing, has no other remedy than an appeal, supposing his case to be an appealable one; but I do not see why, if an admittedly illegal decision has been passed on the merits of his case, he should not still have a remedy under Section 376. In the application under Section 119 no merits were gone into; the only question was whether the defendant could or could not appear, and granting the decision on this point to be final, it does not follow, I think, that the decree on the merits may not be reviewed if circumstances make it desirable.

The words of Section 376 are very wide:—

“Any one considering himself aggrieved by a decree of a Court of original jurisdiction,” &c., &c., may “for good and sufficient reason” “apply for a review of judgment.”

Now it can hardly be said that an *ex parte* decree is not a decree in the terms of the Section; and if that be so, what is there in the law which prevents that decree being reviewed, so far at all events as it relates to matters other than the question of the defendants being served with summons or being unable to appear?

I think that the order cancelling the defendant's tenure and declaring him liable to ejectment was subject to the provisions of Section 376 like any other decree, and that the only thing final about it was the decision on the question of summons.

But it does not follow that the Moonsiff was right in admitting his previous judgment to review in the way he did. Section 376 says that a party aggrieved may “apply for a review.” It nowhere says that a Judge on finding out that he has made a mistake in a judgment may alter or amend that judgment *proprio motu*. The initiative is left to the party who thinks he has discovered an error which the Court would be willing to rectify, and it would be easy to multiply instances in which a contrary method of procedure would be very inconvenient, if not dangerous. The Court Fees Act would be evaded in the first place, and no suit would have any prospect of finality.

In this case, therefore, as the Moonsiff reviewed his previous judgment without any application having been made to him by the party aggrieved, I think that he acted *ultra vires* and that his order should be set aside.

It has been contended that, if this were so,

the provisions of Section 350 would apply ; but if the Moonsiff had no jurisdiction unless properly set in motion, the error in his judgment would not be cured by the Section.

I do not agree with the reasons given by the Subordinate Judge, but I would confirm his decree and dismiss this special appeal with costs.

Birch, J.—I do not consider it necessary to enter into the question whether there can be a review under Section 378 of an order rejecting an application under Section 119, as that point cannot arise in the case before us. No application for a review of judgment was made to the Moonsiff. He took upon himself to re-consider and set aside his own judgment, and this he had no power to do. In this opinion I think that I am supported by a recent ruling published at page 303, Volume XIX, Weekly Reporter. Upon the ground that the Moonsiff in acting as he did acted without jurisdiction, I would dismiss the appeal, and affirm the order of the Lower Appellate Court reversing the Moonsiff's decision.

The 19th July 1873.

Present :

The Hon'ble F. A. Glover, *Judge*.

Grazing Common—Limitation.

Case No. 15 of 1873.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 9th September 1872, modifying a decision of the Moonsiff of Kotulpore, dated the 23rd January 1872.

Ooma Churn Chowdhry (Plaintiff) *Appellant*,

versus

Umbika Churn Day (Defendant) *Respondent*.

Baboo Bungshee Dhur Sen for Appellant.

Baboo Amurendro Nath Chatterjee for Respondent.

Where land situated within a talook is used by neighbouring villagers as a grazing common for the pasturage of their cattle, the presumption is that it is so used with the consent of the talookdar, against whom limitation cannot run by reason of such use as if he were out of possession.

Glover, J.—THE decision of the Judge reversing the decree of the Moonsiff is not, I am bound to say, a satisfactory one.

The plaintiff is admittedly the talookdar of the mouzah, and in that capacity entitled to

all the māl land. The defendant is the owner by purchase of a small resumed lakheraj tenure situate within the mouzah, consisting of 8 beegahs 8 cottahs 7 chittacks and numbered in the Towjee 349, and it is not denied that he is now in possession of 11 beegahs 16 cottahs 11½ chittacks, or of a considerable parcel of land to which his chittah gives him no title.

The Judge has found the plaintiff barred by limitation on the ground that he has not been able to prove possession within twelve years, whilst the survey map of 1857 shows that the disputed land was in that year marked as being in the defendant's possession. Now what the witnesses say is that the disputed land has lain for many years fallow, and that the ryots of many neighbouring villages were in the habit of using it as a common for the pasturage of their cattle. It is not asserted that the plaintiff never used the land for this purpose, nor that the land was not grazed with the plaintiff talookdar's consent.

The Judge has taken the survey map as strong *prima facie* evidence of the defendant's possession in 1857, but would this be so? There was no contest apparently between the parties at that time, and there would have consequently been no award as to possession ; and I do not think that a mere demarcation of the land as in the defendant's possession would under such circumstances be any evidence of the fact : at all events it would be very weak evidence. It is said that the plaintiff's signature is affixed to this map. I cannot find it there, nor has the defendant's vakeel been able to show it to me.

The plaintiff is the owner of all the land of the village except the defendant's resumed lakheraj of 8 beegahs 8 cottahs 7 chittacks ; and there is evidence which the Judge believes that, before the alleged date of ouster, the land was used as a grazing common by his own and by other villagers. I do not think that the plaintiff can be said to have been out of possession : on the contrary I should hold that the grazing by residents of other villages was carried on simply because the owner of the land consented to it. I agree with the Moonsiff in thinking that the law of limitation ought not to have been applied to this case.

As to the merits, I am constrained to say that the Judge's decision is not what it ought to be. The Moonsiff has given his reasons at length for thinking that the land belongs to plaintiff, and one of them is undoubtedly of considerable strength. The defendant by

his own showing is only entitled to 8 beegahs 8 cottahs 7 chittacks, whilst he was found to be in possession of a considerably larger area,—all the land save his resumed lakheraj tenure being admittedly the plaintiff's.

The Judge disposes of the first Court's judgment very summarily. He says:—"The boundaries given in the chittah do not prove that the land in suit belongs to plaintiff. The Moonsiff has made great confusion on this point." And again:—"I am of opinion that there is no proof whatever that the land lies within the plaintiff's māl estate."

No reasons are given for this conclusion, nor is any attempt made to show that the Moonsiff was wrong.

It has been frequently held by this Court that, when a Lower Court of Appeal reverses the decision of a Court of first instance on the evidence, it is bound to give reasons for its decision, and that it is not enough to say in half a dozen words that there is no proof of this, or of that.

In this case, the Moonsiff has given a great many reasons for concluding that the disputed land belongs to the plaintiff's māl estate; and before the plaintiff can be deprived of the benefit of that decree, the Appellate Court must give its reasons for thinking the Lower Court wrong. Section 349 of the Code of Civil Procedure is precise upon this point.

I remand the case to the Judge for a fresh decision on the appeal with reference to the foregoing remarks.

The 21st July 1873.

Present:

The Hon'ble Louis S. Jackson and E. G. Birch, *Judges*.

Act VIII of 1859 s. 119—Application by one Defendant.

Case No. 113 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Jessore, dated the 15th February 1873, reversing an order of the Sudder Moonsiff of that district, dated the 9th July 1872.

• Nistarinee Dassee (Judgment-debtor)
Appellant,
versus

Debnath Bose (Decree-holder) Respondent.
Baboo Bhowanee Churn Dutt for Appellant.
Baboo Bungshee Dhur Sen for Respondent.

An application under Act VIII of 1859 s. 119 by one of several defendants re-opens the case, not against

the applicant alone, but against all the defendants, and the plaintiff's appearance to oppose such application is a step taken for the purpose of keeping the decree in force.

Jackson, J.—It appears to us that the order of the Judge may be supported on the ground on which he has rested it. The decision referred to* by the Moonsiff does not, as he supposes, show that an application by one of several defendants under Section 119 re-opens the case as against the applicant alone. The plaintiff, therefore, would not be bound and could not be expected to proceed with the execution of the decree while the application of one of the defendants to set it aside as wrongfully obtained *ex parte* was still pending. The plaintiff's appearance, therefore, to oppose that application may properly be looked upon as a step taken for the purpose of keeping that decree in force. It may be a question, and it is one which the Courts below do not appear to have entered into, whether the defendant who is the special appellant before us ought to be compelled to pay any thing on account of further costs of the application under Section 119. The decree undoubtedly does make her so liable, but if as the Moonsiff states that decree was passed behind her back, it seems doubtful whether that part ought to be enforced.

The special appeal should be dismissed with costs.

The 21st July 1873.

Present:

The Hon'ble Louis S. Jackson and E. G. Birch, *Judges*.

Certificate of Administration—Act XXVII of 1860.

Case No. 134 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Moorsheda- bad, dated the 15th April 1873.

Golam Sobhan alias Saboo Meah (third Objector) Appellant,
versus

Mahomed Rouf and others (first Objectors) Respondents.

Baboos Obhoy Churn Bose and Sreenath Doss for Appellant.

Baboos Kalee Mohun Doss and Gooroo Doss Banerjee for Respondents.

Where a person had no fixed place of residence at the time of his death, the Judge of the district in

which his debts are has authority to grant a certificate under Act XXVII of 1860.

Jackson, J.—THE appellant claimed the certificate which the Judge has given to the opposite party on the ground that he is the only son of the deceased Sobhan Meah. He also objects to the order of the Judge of Moorshedabad on the ground that the deceased person ordinarily resided elsewhere, and consequently the Moorshedabad Court had no jurisdiction. No doubt part of the evidence would seem to show that the deceased had at one time lived at Rampore Beaulah in Rajshahye, and latterly removed to Nowabgunge which is in the Maldah jurisdiction subject to the Civil Court of Dinapore; but the Police officers whom the Judge considers to be trustworthy witnesses deposed that, although formerly the deceased resided in Beaulah, he latterly had no fixed place of residence. That being so, the case seems to fall within the alternative provided by Section 3 Act XXVII of 1860, and inasmuch as the debts which are sought to be recovered by force of the certificate are in Moorshedabad, we think the Judge of the district had authority to grant the certificate. As to the question of paternity, it appears to us that the Judge is quite right, and the evidence produced by the appellant is not sufficient to bear out his allegation.

The appeal will be dismissed with costs.

The 21st July 1873.

Present:

The Hon'ble F. A. Glover, *Judge.*

Registered Kobalahs—Possession.

Case No. 1896 of 1872.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 22nd July 1872, reversing a decision of the Moonsiff of Tumlook, dated the 24th March 1871.

Narain Doss (Defendant) *Appellant,*

versus

Gunga Ram Dharah (Plaintiff) *Respondent.*

Baboo Kumla Kant Sen for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

Before priority can be given to a registered kobalah over an unregistered bond, it ought to be found whether or not the purchase on the latter document was followed by possession at the time of the sale.

Glover, J.—I AM of opinion that, before deciding that priority should have been given to the plaintiff's registered kobalah, the Judge ought to have found whether or not the defendant's purchase on an unregistered bond had been followed by possession at the time of sale: as if the defendant purchased the land in Srabun 1276 B.S. and took possession then, the transfer (the kobalah not being a document of which registration was compulsory) was absolute and complete, and the vendor had nothing left to sell to the plaintiff by the registered kobalah of Chyet 1277.

Section 50 of Act XX of 1866 refers to cases where the purchase has not been completed by possession. Here, if the defendant's statement be true, the vendor had divested himself of all title in the property long before he pretended to sell it to the plaintiff.

In *Nurshingh Poorkait v. Bikram Majee* (XIV Weekly Reporter, 250), this view of the law has been taken, and so in other and later rulings.

Of course, if the defendant fail to prove possession given to him at the time of sale, the Judge's order would be correct, for the defendant in that case would have to prove fraud on the part of the plaintiff,—*Ram Chaud Koamar v. Modhoo Soodun Mojomdar*, (VII Weekly Reporter, 119); and this the Judge finds that he had not done.

Costs to follow the result.

The 22nd July 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Right of Drainage.

Case No. 18 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 6th September 1872, reversing a decision of the Additional Moonsiff of Nimal, dated the 26th August 1871.

Kopil Pooree (one of the Defendants)

Appellant,

versus

Manick Sahoo (Plaintiff) *Respondent.*

Baboo Grish Chunder Ghose for Appellant.

Baboo Doorga Mohun Doss for Respondent.

There is no reason why the proprietor of land on a higher level should not claim a right to have the water

which falls thereon run off over adjoining land of a lower level, i.e., to be drained.

Couch, C.J.—We see no ground for a special appeal. It has been found that the plaintiff has a right to have the water which falls on his land run off from it over the defendant's land, the plaintiff's land being on a higher level than the defendants.

The case quoted from Marshall's Reports* does not apply to such a case as this. There the plaintiff insisted that the flow of water from his neighbour's land should continue for his benefit, and the water should continue to be collected on his neighbour's land and allowed to flow from it to his own.

There is a right, which is not uncommon and is more like the right now claimed, namely, that of having water which falls on the roof of a man's house that projects over his neighbour's land, fall on it and run off over it. There is no reason that the plaintiff should not have such a right as is claimed in this case. All that the defendant has to do is to provide a passage for the water from the plaintiff's land over his own. He is not required to keep his land in a marshy state; he has only to allow the plaintiff's land to be drained as it has hitherto been.

The appeal must be dismissed with costs.

The 22nd July 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Joint Family—Separate Enjoyment—Acquiescence—Subordinate Rights.

Case No. 951 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 2nd March 1872, reversing a decision of the Moonsiff of Bulleah, dated the 30th November 1871.

Jotee Roy and another (Plaintiffs)
Appellants,

versus

Bheechuck Meah and another (two of the
Defendants) *Respondents.*

Baboo Chunder Maghub Ghose for
Appellants.

Mr. R. E. Twidale and Moonshee Mahomed
Yusoof for Respondents.

When one co-sharer of a joint family is allowed by the other members of the family to have separate and

exclusive possession of family property for a long period of years,—such for instance, as would give him a right on a butwarrah taking place to insist on having the land which he has enjoyed allotted to him,—the other co-sharers must be taken to have knowingly given him the opportunity of creating subordinate rights, or allowing such rights to grow up, and they cannot be permitted afterwards, without showing that they have been deceived in the matter, suddenly to start up and repudiate such subordinate rights.

Phear, J.—THE ancestor of the plaintiff and the ancestor of the defendants second party, constituted a joint family, and had, as a joint family, possession and enjoyment of property, part of which is the subject of the present suit. But the land which is the subject of the present suit, being a portion of the zeraif land of the zemindaree, was for a great many years—by permission of the other members of the family—enjoyed separately and exclusively by the ancestor of defendants No. 2. We are not informed how long this state of things continued, but it seems to have existed as far back as nearly thirty years before this suit was brought; and the other members of the existing joint family had in a similar way each exclusive enjoyment of other portions of the zeraif of the zemindaree. But there was no formal act of division of these lands between the members of the family so far as we understand.

In 1254, the ancestor of defendants No. 2, being then in exclusive possession of this property, granted a mokururee pottah of the land which is the subject of suit to two brothers, one of whom is the last of the defendants of the first part, and the other the father of the other defendants of the first part.

That mokururee pottah is not forthcoming, but it was confirmed by another pottah of the 16th Pous 1266 to which the plaintiff refers, and in which the grant of the original pottah is recited.

Almost immediately after the date of the second pottah, the members of the joint family effected a butwarrah of the zemindaree. This is stated to have taken place in 1266, but the month, I think, is not mentioned. By this butwarrah the land which is the subject of suit, and which had been previously in the separate enjoyment of the ancestor of defendants No. 2 was included in the puttee which was divided off, and allotted to the ancestor of the plaintiff. Thus the defendants No. 1 came to occupy this land under the present plaintiff and his predecessors, instead of under the defendants No. 2 as had previously been the case. They continued however—as far as is

disclosed in this case—to pay their rents to the plaintiffs on the same terms as they before had paid to the defendants No. 2 until the year 1273; at about which time, it seems, the present plaintiff made a claim for increase of rent, and the defendants No. 1 thereupon asserted the mokururee right which they said they had obtained under the pottahs of 1245 and 1266. The plaintiff, however, refused to receive the rent at the old rate, and it was paid into the Collectorate. And eventually the present suit was instituted by the plaintiffs in Pous 1277 for the purpose of obtaining higher rent from the defendants No. 1, or in the alternative to oust them from the occupation of the land.

One head of the defence put forward by defendants No. 1 is that the plaintiff has so long acquiesced in their holding under their mokururee rights that he ought now to be allowed to disturb them.

We have had the plaint and the written statement translated, and it is very plain that the defendants relied strongly on the acquiescence of the plaintiff; and we think that under the circumstances of the case there has been such an acquiescence on the part of the plaintiff as would justify the Civil Court in refusing to give the plaintiff the relief which he asks.

It has already been mentioned that the ancestor of defendants No. 2 had been enjoying this land with other parts of the zernit lands of the zemindaree separate from and exclusive of his co-sharers for a great many years; and he had certainly held possession of this particular plot of the zernit lands through the defendants No. 1 as his tenants from a period which certainly dated so far back as Assin 1254.

When the butwarrah took place in 1266, the defendants No. 1 had thus been in quiet occupation and enjoyment of the land under their mokururee pottah for a period of at least twelve years, and it is to be observed that the mokururee pottah was specially granted to them for the purposes of a garden, and leave was given to them under it to plant trees.

It is very difficult to suppose that the one co-shareholder should not have been aware of what was taking place in this fashion under his other co-sharer on a portion of the zernit lands of the zemindaree throughout so many years. But whether he was so or not, this is certain that when the butwarrah was effected in 1266, he was distinctly made acquainted with the fact that defendants No. 1 claimed to occupy the land under a

mokururee title and at a low rate of rent. When the butwarrah was being effected, the mokururee pottah was distinctly made prominent as one of the assets on the footing of which the division was to be made between the shareholders. The present plaintiff did not at the time make any objection; he did not say that he would not accept a mokururee tenure in his puttee, and would refuse to acknowledge it. If he had done so, this consequence would have followed, namely, the mokurureedar would in all probability have asserted his right to be considered in the butwarrah. He had a right to have his interests there considered by reason of the terms of his pottah; for the grantor of that pottah, the ancestor of defendants No. 2, therein expressly stipulated that, in the event of a butwarrah of the family property taking place and this part of the ground falling within a puttee which was about to be allotted to any other shareholder, he would prevent such a result by giving other land out of his own puttee instead.

The way in which such a stipulation would be worked out in a butwarrah is very plain. As the lands had been for a very long time held in severalty by the ancestor of defendants No. 2, with the permission of the other co-sharers, he had thereby got a right in the butwarrah proceedings to insist that the land so long held by him in severalty should be allotted to him in the share which should be divided off for him; and in making the stipulation which he did in the mokururee pottah, the ancestor of defendants No. 2 became bound to assert that right, if the mokurureedar called upon him to do so. So that if the present plaintiff, or his predecessors, had at the time of the butwarrah, said as they ought to have said, "We cannot accept this mokururee tenure in our puttee; we shall not acknowledge it"; the consequence would have followed that the division would have been so effected as to exclude the present plot from the plaintiff's puttee. The plaintiff did not, however, then raise his voice or dispute the tenure of defendants No. 1. It suited him to take the puttee with this supposed mokururee tenure in it, and he went on for several years without apparently taking any steps in the matter at all. So far as we are told, he did nothing till 1273, and even then it is not very clear what proceedings he commenced for enhancing defendant No. 1's rate of rent. The plaint in this case was not filed till 1277, a period of just eleven years after the time when the

butwarrah was effected, and twenty-three after the date of the defendants' first pottah.

In view of all these facts, we think that the defendants' mokurureedar had a right to insist that the plaintiff should recognize the mokururee title; and if this be so, then clearly the plaintiff ought not to succeed in this suit, and the decision of the Lower Appellate Court dismissing his suit is right.

I will also add, it is the inclination of my own opinion that our present decision might have been put upon even somewhat broader grounds than this.

When one co-sharer of a joint family is allowed by the other members of the family to have separate and exclusive enjoyment and possession of family property for a long period of years, such a period for instance as would give him a right on a butwarrah taking place to insist on having the land which he has enjoyed allotted to him, the other co-sharers must be taken to have knowingly given him the opportunity of creating subordinate rights, or of allowing such rights to grow up, and they cannot afterwards be permitted at any time they like,—without showing that they have been deceived in the matter—suddenly to start up and repudiate all the subordinate rights to which they have thus allowed their co-sharer to give an origin. They have in effect by their conduct invested him with the character of karta of the family in respect to this property, and ought to be treated as having silently acquiesced in his acts.

However, it is not necessary, strictly speaking, to express a judicial opinion on this point because, under the special facts of this case, it appears that the plaintiff is not entitled to succeed for the reasons which have been already given.

The result is that there will be a declaration in the decree to the effect that the mokururee pottah is binding on the plaintiff, and the appeal will be dismissed with costs.

Morris, J.—I am not prepared to say that the present plaintiffs or their ancestors were aware of the lease given for garden purposes by some of their other shareholders to the ancestors of the defendants No. 1. It is in the highest degree probable that they were cognizant of the arrangement. But the plea of ignorance cannot avail them after the year 1859, when the butwarrah took place and the lands comprising this tenure were apportioned and fell within their puttees. In carrying out the butwarrah, the position of defendants No. 1 and the nature of their

tenure must have been ascertained and recognized by all the other shareholders. Had the present plaintiffs then disputed the validity of the mokururee pottah and refused to be parties to it, there would have been some ground for the contention that they knew nothing of it previously, and had never acquiesced in it. But at the time of the partition they raised no question whatever on this head. And as this garden land was treated as land held at a fixed rate of rent under a mokururee pottah, and on this footing was assigned to their puttee after a careful valuation of the entire estate and calculation of its rental, it must be held that they and the other shareholders recognized and admitted the terms on which the defendants No. 1 held their tenure. A garden of upwards of twenty years standing is necessarily a valuable property; and therefore it is impossible to suppose that its real value was overlooked or under-estimated on the occasion of the assignment of the different shares. It is quite clear that the defendants No. 1 remained in undisturbed possession of the garden on the old terms many years,—certainly not less than five years,—after the butwarrah. And as the present suit was instituted in 1870, or within a period of nearly twelve years from the date of the butwarrah, I consider that the plaintiffs must be taken to have acquiesced in the pottah of 16th Pous 1266, and that therefore their suit must fail. To eject the defendants No. 1 in the manner now proposed by the plaintiffs, without even any compensation for the improvement in the land effected during so many years by their labor and at their expense, would be a very inequitable proceeding. As to the question raised whether the terms of Section 6 Act VIII of 1869, B.C., are applicable to these lands, I would remark that no doubt these lands were originally khodkasht or khamar lands leased by the defendants No. 2 to the defendants No. 1. The other shareholders allowed the defendants No. 2 to hold them in their own exclusive possession and to do what they liked with them for a long period of years. They may be said therefore to have waived their own right and to have admitted that of defendants No. 2 to improve the lands by giving out a portion for garden or other purposes on perpetual leases. Such perpetual leases are very different from those contemplated by Section 6 which are only leases for a term or year by year. However, this point is not of importance in the present case, and need not be

determined here. I would affirm the validity of the mokururee pottah, and dismiss this appeal with costs.

The 23rd July 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Registration—Act VIII of 1871 s. 17.

Case No. 1683 of 1872.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Beerbhoom, dated the 6th August 1872, affirming a decision of the Officiating Moonsiff of Bonpore, dated the 10th February 1872.

Joy Rām Gossain Bhattacharjee (Plaintiff)
Appellant,

versus

Kalee Narain Roy (Defendant) *Respondent.*

Baboos Sreenath Doss and Doorga Mohun Doss for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Where the parties had agreed upon a sale of certain property and the terms were settled, but the seller took an advance of Rs. 100, the instrument which was drawn up showing that the intention was that the purchaser should have a security upon the property for the money advanced, HELD that the instrument operated as a charge upon the property to the extent of Rs. 100, and came within the terms of Act VIII of 1871 s. 17.

Couch, C.J.—THE words of the 2nd Clause of Section 17 of Act VIII of 1871 require that an instrument which purports or operates to create an interest of the value of Rs. 100 or upwards in immoveable property shall be registered; and the judgment of the Judicial Committee in the case in XIV Moore's Indian Appeals, page 129,* shows that not merely the language of the instrument is to be looked at, but it is to be seen whether it does in effect operate to create a charge. Their Lordships said of the document in that case that it was an instrument acknowledging payment of consideration money for what was to be ultimately an absolute sale of the property in question, and what in equity would operate as a sale of the property. They did not

refer to the words "we have sold" which occur in it, but they based their decision upon its operating as a sale of the property.

We have to see, then, what was the operation of the instrument in this case. It appears from the statements in it that the parties had agreed upon a sale of the property for Rs. 400, and the terms had been settled; that the seller, being in urgent want of money, wished to have an advance of Rs. 100 on account of the consideration money, and that was paid to him. The instrument which is not artificially drawn appears to us to show that what the parties intended, and what the purchaser might very well insist upon, was that he should have a security upon the property for the Rs. 100 that he was going to advance. We are not to look at the precise words used so much as the intention of the parties to be gathered generally from the instrument. We think it was intended that, in the event of the sale not being completed, the seller refusing to complete it, or trying to sell it to any one else, the purchaser should have a charge upon the property for the money. This instrument operated as a charge upon the property to the extent of Rs. 100 and comes within the terms of the Section. And it was necessary that it should be registered.

The appeal must be dismissed with costs.

The 23rd July 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Mokururee Grant—Competency of Grantor.

Case No. 132 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 14th March 1872.

Syud Ameer Ali and others (Plaintiffs)
Appellants,

versus

Heera Singh and others (Defendants)
Respondents.

Mr. R. E. Twidale and Baboo Romesh Chunder Mitter for Appellants.

Mr. C. Gregory and Baboo Bhowanee Churn Dutt and Luckhee Churn Bose and Moonshee Mahomed Yusoof for Respondents.

When a party who makes a mokururee grant has enough in him to make it substantial and valid, he cannot in a Court of equity be allowed afterwards to deny its efficacy.

* 16 W. R., P. C., 26.

Phear, J.—We think that the decision of the Court below is correct. It appears to be certain that one Tegh Ali, in 1859, made to the Defendant's predecessor a mokururee grant of the land which is now in dispute. He had at that time by inheritance from his uncle Hossein Ali a title to that land entirely irrespective of any title which he might previously have obtained by virtue of the deed of sale alleged to have been made to him by Hossein Ali in 1254. If the title under the deed of sale failed him, he still had a good title by inheritance. He himself, therefore, could not deny that the mokururee pottah which he granted in 1259 did in effect pass any interest to his grantee. It is we think a matter of small importance whether in his mokururee pottah he referred in terms to or recited the kabolah or deed of sale of 1254. This is not the case in any degree of a mere assignment of a particular title. No doubt had Tegh Ali pretended to assign a particular title to or interest in land which he did not possess and had not the means of making good, nothing would pass under the assignment. But inasmuch as when he made the mokururee grant, he had enough in him so to speak to feed that grant, *i.e.*, to make it substantial and valid, it is impossible in a Court of Equity that he should be allowed afterwards to deny its efficacy. And if he himself could not deny it, then his successors in title are equally unable to deny it. Indeed we may add that, according to English law in matters of this kind, if the grantor at the time of making the grant had not the property of which, or out of which, he professed to make the grant, and afterwards came to possess it, he would be compelled to make good his grant, unless of course something subsequent to the original transaction came in to make it inequitable that he should be called upon to do so. In this state of the case, the plaintiff's claim against the original defendants falls wholly to the ground.

There were, however, at the trial two issues raised between the plaintiff and a person named Chutturputty Singh, who was allowed to intervene. But these issues have not been tried and determined by the Lower Court. In this also we think that the Lower Court was right. The plaintiff having failed in his primary suit, there was no occasion to try any question between him and the intervenor. It is possible of course that the plaintiff may have a good cause of action on these issues; and as there seems to be some reason to suppose that, if the decree of

the Lower Court stands in its present form, he may be prevented from asserting his claim upon this cause of action in any future suit, we think it right so far to modify the decree of the Court below as to say that it shall be without prejudice to any claim of this kind. In all other respects the decree will stand. We dismiss the appeal with costs. There must be separate costs for those defendants who have appeared by Mr. Gregory and Moulvee Mahomed Yusoo, and also for Chutturputty Singh. The other defendants do not seem to have appeared in this Court.

We think further that the two sets of defendants just mentioned should have separate costs in the Court below.

The 24th July 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Instalments—Penalty.

Case No. 117 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 30th November 1872, affirming an order of the Moonsiff of Gurbetta, dated the 14th September 1872.

Shama Churn Singh (Decree-holder)
Appellant,

versus

Protap Coomar Ghossal and others
(Judgment-debtors) *Respondents.*

Baboos Kalee Prosunno Dutt and Hem Chunder Banerjee for Appellant.

Baboo Gopeenath Mookerjee for Respondents.

A decree-holder intending to enforce the penalty for delay in the payment of instalments is bound to tell the judgment-debtor so when the instalments are brought to him.

Couch, C.J.—IN this case two per cent. per mensem was the penalty for non-payment of the instalments at the time fixed. Both the Courts have found that the decree-holder received money on account of the instalments due, without saying that he intended

to insist upon the penalty; and we are asked to say whether they were right. If the decree-holder meant to claim his 24 per cent. interest as soon as default was made in payment of an instalment, he should, when the money was brought to him, have told the judgment-debtor that he was going to do so.

The appeal must be dismissed with costs.

The 24th July 1873.

Present:

The Hon'ble Louis S. Jackson and E. G. Birch, Judges.

Right of Way—Processions.

Case No. 1538 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 8th July 1872, modifying a decision of the Moonsiff of Bohur, dated the 29th January 1872.

Lokenath Gossamee (one of the Defendants)
Appellant,

versus

Monmohun Gossamee and others (Plaintiffs)
Respondents.

Baboos Annund Chunder Ghossal and Aukhil Chunder Sen for Appellant.

Baboos Chunder Madhub Ghose and Huree Mohun Chuckerbutty for Respondents.

A general right of way includes a right to carry marriage and funeral processions.

Jackson, J.—THE plaintiffs in this case sought to establish a general right of way and passage for boats with marriage and funeral processions through a khal leading to the defendant's tank, and also to establish their right to use the waters on the ghut of the said tank for the purposes of certain ceremonies. This right was claimed by virtue of prescription arising from use for very many years. The Moonsiff gave the plaintiffs a decree in full, which the Judge modified by

declaring the plaintiffs' general right of way, but refusing to declare their right to carry marriage and funeral processions. This exception was founded upon the fact that in the Judge's opinion the plaintiffs had "established no express right to bring funeral or marriage processions across this tank."

We have been referred by the plaintiffs who as well as the defendant, appellant, object to this decision to a case very much in point decided by two Judges of this Court—the late Mr. Justice Elphinstone Jackson and the late Mr. Justice Mookerjee, where the Lower Appellate Court having decreed to the plaintiff a general right of way, but excepted a pathway for marriage processions, such finding was disapproved by the Division Court, and it was ordered that the case should be remanded in order that it might be found "whether by the custom prevalent in that part of the country it is usual, when making grants to the public of a thoroughfare or pathway over one's field, to make the grant in such restricted and limited a form as to exclude all processions whether on foot or not, and whether in this particular case there is evidence to show that the original grant when made was of this nature or not."

The present case differs from the one cited only in this respect that there the right of way claimed was over dry land or pathway, whereas in this case the plaintiffs and their family claim the right of way over water. But the observations of the learned Judges in that case are quite applicable to this case. The defendant's Vakeel has sought to convince us that the plaintiffs really claim two distinct things, firstly, a general right of way, and secondly, a separate right to carry marriage and funeral processions. It seems to us that this was not so, and that the marriage and funeral processions and the certain other ceremonies spoken of were only instances in which the general right was to be exercised. The defendant gave no evidence to show that the plaintiffs' right was limited so as to exclude marriage and funeral processions, &c. His contention was that the plaintiffs had no right whatever. This question has been found in favor of the plaintiffs, and it seems to us that that finding includes the plaintiffs' right to pass with marriage and funeral processions which any person of the plaintiffs' position would regard as the most valuable exercise of such right. We think the judgment of the Lower Appellate Court in so far as it varies the judgment of the Moonsiff must be reversed, and the decree of the Moonsiff restored with costs.

The 25th July 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

*Enhancement of Rent—Notice—Cross-appeals—
Decree.*

Cases Nos. 1883 to 1885 of 1872.

*Special Appeals from a decision passed by
the Officiating Judge of Tirhoot, dated
the 19th August 1872, reversing a
decision of the Sudder Moonsiff of
Mozufferpore, dated the 30th April
1872.*

Lalla Rughoobuns Sahoy and others
(Defendants) *Appellants,*

versus

Mussamut Asloo (Plaintiff) *Respondent.*

*Baboo Hem Chunder Banerjee for
Appellants.*

*Mr. C. Gregory and Moonshee Mahomed
Yusoof for Respondent.*

In a suit for enhancement of rent where the ryots plead that their relations with the zemindar are peculiar, it is not sufficient for a notice to set forth, and for a Court to find, that the rent paid in respect of the land in dispute is lower than the rent paid in respect of neighbouring lands; the Court is bound to inquire into the status and situation of the defendant ryots with those of the ryots of the neighbouring lands.

When two parties to a suit appeal, so that the one appeal is but the cross-appeal of the other, there ought to be only one final decree made between the two parties.

Phear, J.—THE plaint in this case is far from being clear. The substance of it is that the plaintiff seeks to recover from the defendants rent of a certain plot of land at certain old rates for the year 1277, and at an enhanced rate on the footing of a notice for the year 1278.

The defendants do not object to the old rates, but they say with regard to the new rates in the first place that the notice of enhancement is insufficient in its terms; and in the next place, that, if it does contain any good ground of enhancement, such ground does not in fact exist.

We have had the notice of enhancement read to us; and certainly it is a specimen of confusion and of a jumbling together of different things such as we very seldom meet with. It is impossible to abstract it,

and therefore I will read it at length. After the address it runs thus :—

“The whole and entire 4 annas in the entire 16 annas of the aforesaid mouzah, which constitutes a puttee partitioned by Government, is in the possession of me, Mussamut Bibee Asloo; and in the said puttee you all have a garden containing 7 beegahs 7 cottahs and $3\frac{1}{2}$ dhooors of land, and you, in collusion with the ticcadars, are asserting that the rate of the same is 8 annas per beegah: whereas at the time of the permanent settlement, the rate of the aforesaid garden was recorded at the rate of Rs. 1-12 a beegah; and as the rate alleged by you all, as also the rate of the time of the settlement, are contrary to the rate of the lauds having common ‘ails’ (ridges) and common boundaries, and are much less in comparison to the productive powers and quality (of the lands); and as the profits and produce of the said lands have been increased in comparison to what they were before without your labor; and as the rate of the neighbouring lands of the first class, is Rs. 7 a beegah; of the second class, Rs. 5 a beegah; and of the third class, Rs. 3-12 a beegah; but notwithstanding repeated demands, you all are not disposed to give kubooleuts according to the aforesaid rates: consequently according to the rate of the neighbouring lands of second class at Rs. 5 a beegah, the rent of the aforesaid 7 beegahs 7 cottahs and $3\frac{1}{2}$ dhooors of land having been fixed Rs. 36-13 from the year of 1278 Fuslee, repeated warnings were given for delivering kubooleuts and obtaining pottah at the aforesaid rate and jumma; notwithstanding repeated warnings, you have not executed the same at my zemindaree cutcherry, nor are you now found disposed to do so. Consequently, in pursuance of Section 13 Act X of 1859, an itlanamah (notice) is issued in your names and in the name of the manager of Raj Durbhangah.

“It is required that you and any karpurdauz of the manager sahib having appeared at my zemindaree cutcherry should take out a pottah from me at the said rate and jumma from the year 1278 Fuslee, and deliver your kubooleut; otherwise, in case you do not accept the rate and the jumma, you should withdraw yourselves from your cultivation, and from the beginning of 1278 Fuslee a settlement

"will be made with somebody else paying
"at the aforesaid rate."

And beneath this notice is written a schedule, in which the land is described as a garden, 7 beegahs 7 cottahs 3½ dhoors in extent, and Rs. 5 per beegah.

All I can say is that, after the best attention which I have been able to give to the consideration of this notice, I am unable to satisfy myself what were the grounds upon which the plaintiff supposed that she had a right to claim an enhanced rate of rent from the defendant, and upon which she intended to rely. And it would be a matter of surprise to me to learn that the ryot-defendants are able to make much more of it than I am. The Act to which reference is made in this notice prescribes in very distinct terms indeed three grounds upon which a zemindar may claim enhanced rate of rent from a ryot who has a right of occupancy. There cannot possibly be any difficulty in stating one or all of these grounds in the notice on the part of the amlah, very ordinary amlah even, of any zemindaree. It seems, however, in this case that the plaintiff's amlah were incompetent to express even approximately the grounds upon which they sought to increase the rent of the tenant. If this be so, and about it there can be no doubt after this notice has been read, it seems to be very hard that it should be presumed against the ryot that he must have apprehended from the terms of this notice what precisely were the grounds upon which his zemindar intended to proceed. It must be remembered that, according to the law, the ryot is entitled to have a distinct statement of the grounds of proposed enhancement given to him before the commencement of the agricultural year, *i.e.*, the grounds upon which the zemindar intends to claim from him an increased rate for the ensuing year. When the question arises in the Court which is to try the suit between the parties, whether the notice given by the zemindar was a notice sufficient under the law or not, the Court no doubt may look to the conduct of the parties and the character of the case presented to it by them and their witnesses for the purpose of satisfying itself whether the ryot clearly understood the notice or not. If it appears to the Court that the ryot never had any real misapprehension as to the terms of the notice and the ground upon which the increase of rent was asked from him, then the next question

to be decided is whether the zemindar has established by evidence to the satisfaction of the Court the grounds which he embodied in his notice.

It appears to me in the present case the Court ought not to have decided the objection which the ryot made to the sufficiency of the notice against the ryot. There is nothing in the whole course of the proceedings to justify the conclusion that the parties entirely understood one another upon the subject of the notice. I have already observed that the defendants contended that none of the conditions of the notice, whatever they were, were satisfied in this case. They urged specifically that they were in a peculiar condition in regard to the relations between them and the zemindar. They said distinctly that they were not ordinary ryots, because they had at one time been the maliks, and were at the present time in the receipt of the malikana, and on account of the peculiarity of their situation they have been allowed all along to occupy this land at specially low rates. They further distinctly drew the attention of the Court to the fact that the land the rent of which was sought to be enhanced was not ordinary agricultural land, but by the very terms of the notice of enhancement was a garden, parts of it, at least, producing fruit trees only.

Now, obviously, even if the first Court was right in deducing from the notice the ground of enhancement which is given in the third Clause of the 17th Section of the Act, it was bound to inquire into, and to make a comparison between, the situation and status of the defendants as they alleged it, with the situation and status of other ryots with whose lands the lands in suit were to be compared. The notice, no doubt, in a manner made this the ground of enhancement, that the rent paid for this land was lower than the rent paid in respect of neighbouring lands, but it did not go on to say,—paid for garden lands like the defendants' or by ryots similarly situated with the defendants. And if it had gone on to mention these two ingredients essentially necessary to make the notice complete under the Act, if it had gone on to say this matter, it is quite clear that the evidence which the zemindar brought into Court entirely failed to establish it.

The issues which the Moonsiff had to try were essentially issues of fact which could only be supported by the testimony of

persons who by their situation were able to speak to the facts. But the Moonsiff came to the conclusion that the defendants' rate of rent ought to be enhanced without giving attention, as far as I can detect, to any evidence of this kind whatever. He refers to Raibundee and also to a decision which had been passed as against a neighbouring ryot. But he does not discuss any of the evidence, if evidence there is on the record, which goes to show the status of the defendants or the relation in regard to character which the garden land of the defendants bore to the lands of their neighbours. There has been a clear avoidance in this suit, either intentionally or unintentionally, by the first Court, of the issues which were raised by the written statement of the defendants between the defendants and the plaintiff.

I have referred to the carriage of the trial in the first Court at this length, because it seems to me that instead of doing anything towards removing the objection which the defendants made to the sufficiency of the notice, that which occurred in the first Court tended to show that a miscarriage of the whole case had come about by reason mainly of the very insufficiency of the notice.

The Lower Appellate Court does not seem to have gone into the merits of the case at all. The Judge simply states that in his opinion the Moonsiff had given great care and attention to the trial, and he saw no reason for disturbing the judgment. He did however disturb it in one particular, for he raised the rate of rent from Rs. 3-12 which the Moonsiff had fixed to Rs. 5.

It seems to me, as I have already more than once stated, that the notice of enhancement in this case was so bad that the Moonsiff ought to have given effect to the defendants' objection when it was first made, and declined to go on with the trial. And nothing whatever happened afterwards to mend the case in favor of the plaintiff. I therefore think that the appeal should be allowed, and that the plaintiff's suit, so far as regards the enhanced rate of rent, should be dismissed with costs.

The result is that there must be one decree drawn in each case, the rent for 1277 being calculated at Rs. 1-12 as the Judge has found, and as there is no appeal against that finding; but for 1278, the rent must be reckoned at the rate of 8 annas.

I cannot here abstain from remarking upon the extraordinary complexity which the Lower Appellate Court has allowed to be introduced into the proceedings. It seems that in these three suits brought by the same zemindar, both parties appealed in each of them. Thus there were in the whole six appeals; and six different decrees have been passed by the Appellate Court just as if they were made in six suits between six different parties. It is, however, obvious that when two parties to a suit appeal, so that the one appeal is but the cross-appeal of the other, there ought to be only one final decree made between the two parties. As the record now stands, in each of these cases there would be two decrees to execute between the same parties, and two awards of costs against the same parties. It is almost by an accident that we became aware of this fact. But as it is brought to our notice, I think that we ought to instruct the Lower Court that these proceedings are irregular. There was nothing whatever to prevent the final decision of the Court in each case upon the two appeals from being embodied in one decree. Nay, not only was there nothing to prevent, but it was the duty of the Court to make one decree, and only one decree, between the same parties.

Morris, J.—I would add that I concur in thinking that the notice of enhancement was too defective in its terms. Both in the notice and in the Courts below unnecessary importance has been attached to the fact that, at the time of the settlement of the village in 1257, the rent to be paid by the proprietor to the Government was fixed at an average rate of Rs. 1-12 per beegah of rent. But it is clear that such an assessment of the entire village is no criterion of the rate payable per beegah in the case of any particular holding; more especially when, as in this case, the lands comprising this holding are, as it would seem from the written statement of defendants, of two classes, namely, the garden lands and kasht lands, that is, culturable lands. The real grounds of exemption from enhancement of rent raised by defendants have not been properly investigated and determined by the Lower Courts; and therefore, for this reason, as well as for the insufficiency of the notice, I would dismiss the suit of the plaintiff with reference to the enhanced rate of rent, with costs.

The 16th May 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

*Inheritance—Mahomedan Widow—Suit by Heirs
—Dower—Accounts—Jurisdiction.*

Case No. 58 of 1872.

*Regular Appeal from a decision passed by
the Subordinate Judge of Bhaugulpore,
dated the 30th December 1871.*

Mussamut Asloo (Defendant) *Appellant,*

versus

Mussamut Umdutoonnissa (Plaintiff)
Respondent.

*The Advocate-General and Messrs. J. T.
Woodroffe and R. E. Twidale, and
Moonshee Mahomed Yusoof for Appellant.*

*Messrs. J. P. Kennedy and C. Gregory,
Moulvee Syud Ameer Ali, Moonshee
Abdool Baree, and Baboo Unnoda Pershad
Banerjee for Respondent.*

Case No. 65 of 1872.

Mussamut Umdutoonnissa (Plaintiff)
Appellant,

versus

Mussamut Asloo (Defendant) *Respondent.*

*Mr. C. Gregory and Moonshee Abdool
Baree for Appellant.*

*Mr. R. E. Twidale and Moonshee Mahomed
Yusoof for Respondent.*

Under the Mahomedan law which governs members of the Sheah sect, a widow having no child alive by her deceased husband inherits nothing of the land which he has left.

In a suit by the heirs of a deceased Mahomedan to recover from his widow landed property, of which she claims to be in possession as absolute owner under a mokurree deed alleged to have been executed in lieu of her dower, where she wholly fails to prove execution of the deed, it is competent to the Court, instead of referring the plaintiffs to a separate suit, to direct an account to be taken of the mesne profits received by the widow and of the amount due to her on account of dower with a view to the settlement of the claims of both parties.

Kemp, J.—THIS is an appeal from the decision of the Subordinate Judge of Zillah Bhaugulpore, dated the 30th December 1871.

The suit is for possession of one-third, out of three-thirds, of the immoveable property

left by the late Mahomed Ashkaree *alias* Zamin Ali.

The estates of the deceased are situated in four districts, the major portion lying in Zillah Bhaugulpore. The properties are worth on a low estimate (*viz.*, 10 years' purchase) Rs. 2,00,000.

The valuation put upon the claim of the plaintiff is Rs. 84,498-7-6, which includes mesne profits and the value of certain moveable properties.

The plaintiff alleges that Mahomed Ashkaree died on the 3rd October 1869, leaving a widow, the defendant, Mussamut Asloo, and his maternal grandmother, Mussamut Lutfoonnissa, as his heirs; that according to that portion of the Mahomedan law of inheritance which applies to the "Sheah Sect," the maternal grandmother alone was entitled to succeed to the entire immoveable property of the deceased, and that the widow, Mussamut Asloo, was entitled to succeed to one-fourth of the moveable property, the maternal grandmother being entitled to the remaining three-fourths.

That Lutfoonnissa died on the 28th Rujjib 1277, Fuslee, leaving, the plaintiff, her daughter, and Ali Jan, her son, as the legal heirs.

That the defendant, notwithstanding the plaintiff's clear right to succeed, has continued to hold possession and to appropriate the mesne profits of the entire estate of Mahomed Ashkaree. The cause of action is alleged to have accrued on the death of Mussamut Lutfoonnissa. It is further stated that Lutfoonnissa was not permitted by the defendant to take possession; mesne profits are therefore claimed from the date of the death of Mahomed Ashkaree. Two supplemental plaints were put in, and admitted by the Lower Court: the first is dated the 20th February 1871, and the second the 21st July, the same date on which the defendant put in her written statement. The first supplemental plaint refers to certain dwelling-houses and a garden which by some oversight were not included in the schedule appended to the original plaint; the second, to a deed of istemrree mokurree set up by the defendant, to defeat the claim of the plaintiff, and the prayer of this last plaint was that the Court would set aside and cancel that deed as not made by the deceased, Mahomed Ashkaree, with any *bonâ fide* intention of divesting himself of the ownership of the properties covered by that deed.

The defendant put in her written statement on the 21st July 1871.

It states briefly that the plaintiff is not entitled to inherit any portion of the immoveable property of the deceased Mahomed Ashkaree; that Mahomed Ashkaree executed and delivered to the defendant a deed, dated the 3rd November 1866, duly registered and subscribed to by the husband of the plaintiff, and by other relatives, in respect of the whole of his rights in 172 mouzahs, which are detailed in the deed, in lieu of dower due to the defendant, amounting to Rs. 41,100, reserving to himself the sum of Rs. 600 to be paid to him annually by the grantee, who, after paying this sum and the Government revenue, was to enjoy the remaining profits; that the defendant, from the date of this deed, and up to the present time, has been, and still is, in possession of the whole of the properties covered by the deed, letting out those properties to ticcadars, and conducting in her own person all suits connected with those properties.

That, according to the Mahomedan law governing the parties to the suit, the defendant, as the widow of the deceased, is entitled to one-fourth of the whole estate, moveable and immoveable, left by the deceased Mahomed Ashkaree.

Then follows an objection to the value and quantity of the moveable properties claimed by the plaintiff.

An objection is also taken to the claim on account of mesne profits, which is stated to be altogether incorrect.

It is then stated that, owing to the dishonesty and the "keeping aloof" of some of the servants of the late Mahomed Ashkaree, the defendant, at the time of filing her written statement, had not been able to place her hands upon the original mokururee deed; and that she was, therefore, obliged to file a copy taken from the office of the Registrar of Deeds.

It is added that it was improper to prefer a claim by way of supplemental plaint for reversal of the mokururee deed, which was executed with the intention of effecting a valid transfer and of making the defendant the absolute owner; that it was not executed "muslabutun," to meet the exigencies of the time, but in lieu, and in satisfaction, of the defendant's claim for dower; that the deed, from the date of its execution, has had operation and is still in force.

The pleaders for the defendant appear to have been questioned by the Subordinate Judge on the same date as that on which the defendant's written statement was filed.

They stated in answer to questions put to them by the Court that the defendant, Mussamut Asloo, at present had no issue of her womb, nor any heirs descended from her uncle, or female children. In the matter of the moveable properties claimed, the pleaders for the defendant stated that some of those properties were not in the possession of their client; that some of them were her exclusive property; and that the rest had never come into the possession of their client.

The Subordinate Judge fixed the following issues for trial:—

1st.—Whether the deed of mokururee was executed *bonâ fide*, or to meet some exigency of the time; and whether by virtue of it, the defendant has continued in possession or not?

2nd.—Whether, in the event of the mokururee deed being genuine, the plaintiff can obtain khas possession of the property in suit, regard being had to the conditions prescribed therein?

3rd.—Whether, according to the Imamea doctrine, the wife legally inherits any portion of the immoveable estate left by her husband?

4th.—Whether the entire 16 annas of the Hosseinabad houses and the garden are the estate of the late Mahomed Ashkaree, or he had only a one-third share of the one anna; who holds possession of the same, and how?

5th.—Whether the whole of the moveable property mentioned in the plaint was the estate of Mahomed Ashkaree, and whether they are in the possession of the defendant?

6th.—Whether the carpets, books, and utensils, which the defendant avers were left by Mahomed Ashkaree on his death, are in her possession or not?

7th.—What are the extent and value of the moveable properties in suit?

8th.—In what properties, and for what share, can the plaintiff obtain possession?

These issues have been copied almost *verbatim* from the record.

On the first and second issues, which refer to the mokururee deed set up by the defendant, the Subordinate Judge observes that the deed purports to convey the rights of Mahomed Ashkaree in 172 mouzahs in lieu of dower due to the defendant, the defendant paying to Mahomed Ashkaree Rs. 600 per annum; that it was admitted that the gross assets of the properties covered by the deed are from Rs. 38,000 to 40,000 per annum, and that the revenue payable to the Government is Rs. 20,000 per annum, so that the net profits are between Rs. 15,000 and Rs. 20,000 per annum.

That the grant in perpetuity of such a considerable income and profits upon a quit rent of Rs. 600 per annum, by which Mahomed Ashkaree reserved for his maintenance only Rs. 50 per mensem, cannot, on any account, be held to be good and true—"uslee" is the word used—because, in the face of such considerable property, the dower of Rs. 41,100 was a very insignificant sum; and there was no occasion to grant a *bonâ fide* mokururee of all the property in lieu thereof, for a grant of a smaller portion of the estate of the grantor would have been sufficient.

The Subordinate Judge then alludes to certain correspondence which is on the record, and is of opinion that this correspondence fully establishes that all demands for money and orders regarding suits were made by Mahomed Ashkaree as absolute owner.

On the third issue, the Subordinate Judge finds that, according to the Sheah religion, a wife without issue is not entitled to inherit any portion of the immoveable estate of her deceased husband; that the order of succession on the death of Mahomed Ashkaree was that his entire immoveable estate was inherited first by his maternal grandmother Mussamut Lutfoonnissa, and on her death by Ali Khan and the plaintiff, the former taking two-thirds and the latter one-third.

On the fourth issue, the Subordinate Judge observes that from the presumptions arising out of the circumstances of the case, it appeared that all the houses and the garden are ancestral; that the particular share of Mahomed Ashkaree was one-third, and that the plaintiff is entitled to inherit one-third of the share of Mahomed Ashkaree.

On the remaining issues, 5, 6, 7, and 8, the Subordinate Judge finds that the claim to the ornaments is superfluous; that those ornaments are either the exclusive property of the defendant, or were given to her by her husband. It appeared to the Subordinate Judge that the plaintiff had over-valued, and the defendant under-valued, the remaining moveable properties. Deducting, therefore, the value of the ornaments, he was of opinion that the moveables were worth Rs. 2,000.

The claim to recover on account of a zur-i-peshgee transaction was rejected, as well as the claim to mesne profits prior to the suit, inasmuch as the Subordinate Judge was of opinion that the zur-i-peshgee was a recent transaction, and the possession of the defendant was not wrongful.

The Subordinate Judge somewhat inconsistently, after coming to a clear finding that

the deed of mokururee set up by the defendant to defeat the plaintiff's claim to inherit was a sham, and never had or was intended to have operation, states that the deed "has in reality been set aside more on account of the special conditions contained therein." A modified decree was given, thus:—The plaintiff to be put into possession of one-third of the mouzals in suit mentioned in the deed of mokururee, and of the unobjected mouzals left by Mahomed Ashkaree, and of one-third out of one anna of the houses and garden situated at Hosseinabad; that the claim to the zur-i-peshgee and mesne profits prior to suit, and for the ornaments, be dismissed; that a decree be given to the plaintiff for Rs. 500 on account of the remaining moveables with mesne profits of the one-third share in the mouzals decreed, from the date of suit, to be ascertained in execution. The parties to pay costs in proportion.

Both parties appeal, the plaintiff by way of cross-appeal. The parties to this suit are governed by that portion of the Mahomedan law which is applicable to the sect to which they belong, *viz.*, the Sheah Sect.

Mr. N. B. E. Baillie's Digest of the Mahomedan Law, volume 2nd, which treats of the doctrines of the Imamea Code, is, with the exception of the last book of that volume, composed entirely of translations from the "Shurayaool Islam," a work of the highest authority. The Subordinate Judge, a Mahomedan Judge, in accordance with the *fatwas* filed by the plaintiff, which he states to be in his opinion correct, finds that, by the law which governs the parties to this suit, the defendant is not entitled to inherit any portion of the immoveable estate of her late husband. The only objection taken in the original petition of appeal filed by the defendant on the 15th March 1872, bearing upon the decision of the Subordinate Judge on this law point, is to be found in the twelfth ground, which is to this effect:—

"That the question of the title of the plaintiff by inheritance has not been correctly tried; and she is not entitled to the property which has been decreed to her."

A supplemental petition of appeal was presented at the time of hearing by the Counsel for the defendant, appellant, and was admitted by the Court: the second paragraph of that petition is to the following effect:—

"That the third issue has not been correctly tried and decided by the Subordinate Judge. A widow is entitled under the provisions of the Mahomedan law prevailing

"among the followers of the Sheah Sect, to a share of her husband's estate, both moveable and immoveable. Under no view of the law is a widow, who has had children, deprived by that law of her right to a one-fourth part of her husband's estate, both moveable and immoveable, by reason of the death of her children in her husband's lifetime. Moreover, even if the defendant be not entitled to a fourth of the immoveable estate of her husband's property, she is entitled to have the value of that share assigned to her."

It appears very clear that the pleaders, or whoever advised the defendant to file this supplemental petition of appeal, must have done so in reliance upon a passage in Baillie's 2nd volume, page 295.

That passage runs thus:—

"When the wife has had a child by the deceased, she inherits out of all he has left; and if there was no child, she takes nothing out of the deceased's land, but her share of the value of the household effects and buildings is given to her. It has been said, however, that she is to be excluded from nothing except the mansions and dwellings; while Moortaza (may God be pleased with him) has expressed a third opinion to the effect that the land should be valued, and her share of the value assigned to her. But the first opinion is that which appears to be best founded on traditional authority."

One of the learned Counsels for the respondent, Moulvie Syud Ameer Ali, impugned the correctness of Baillie's translations. The Court sent for the work called the Shurayool Islam from the library, and directed the Court translator to submit a correct translation of the original passage, which is in Arabic: the correctness of the translator's version was not impugned.

The passage runs thus:—"If there be a child to the wife by the deceased, she inherits out of all he has left, and if there be no child, she inherits nothing of the land, but her share of the value of goods and buildings will be given to her. It has, however, been said that she will not be debarred from anything except houses and buildings; while Moortaza (may God be gracious to him) has expressed a third opinion, which is, that the land should be valued, and her share of the value assigned to her. The first opinion is the best known."

It is clear, therefore,—and in his argument in reply the learned Advocate-General did

not attempt to argue that this translation was not a correct one,—that, under the Mahomedan law which governs the parties to the suit, Mussamut Asloo having no child alive by the deceased at the time of his death, "inherited nothing of the land."

In a case to be found in Volume IV of the Reports of the High Court of Judicature for the North-Western Provinces, page 13, Mussamut Tomanjan, defendant, appellant, *vs.* Mussamut Mehndi Begum, plaintiff, respondent, it was held that, according to the law governing the Sheah Sect, "a childless widow takes nothing in the husband's immoveable property." That brings us to the consideration, — first, whether the deed set up by the defendant to defeat the plaintiff's right to inherit is *bonâ fide*, and had operation; and if so, then, secondly, whether, according to the true construction of the conditions of that deed, looking to the conduct and intentions of the parties and all the surrounding circumstances of the case, the plaintiff is entitled to inherit the share claimed, notwithstanding that deed. The deed will be found at page 78 of the printed book; the translation is substantially correct. It is dated the 3rd November 1866. A schedule of the mouzahs comprising the grant is appended to the deed, which was presented for registration by the grantor in person on the 18th November 1866. There are thirty-seven subscribing witnesses, a very few of whom have been examined in this suit.

It is very important to notice the position of the parties when this deed was executed.

The husband, Mahomed Ashkaree, was then twenty-five years of age. His wife, the defendant Mussamut Asloo, was, we conclude, younger; two children were then alive, a boy aged eight years, and a girl aged four years. The parents were on the eve of proceeding on a pilgrimage to Mecca. The husband was not involved; not a single decree has been put in to show that he was indebted, or that there was any pressure on the estate. In that state of things, it is said by the defendant that the deed in question was executed and delivered to her.

The deed recites that a sum of Rs. 41,000 and 5 gold mohurs, each gold mohur being equivalent to Rs. 20, or altogether Rs. 41,100, were justly due by the grantor of the deed to his wife, Mussamut Asloo, on account of her dower; that the grantor, of his own free will and accord, executes the mokurree istemraree pottah in his wife's favor in lieu of her dower, and places her in possession of

all the properties covered by the deed. The grantee is to pay the Government revenue, and the grantor reserves to himself an annual allowance of Rs. 600 per annum, payable in 12 monthly kists or instalments of Rs. 50.

It is in evidence that the profits of the estates thus granted, which, with the exception of one or two petty village yielding profits under one hundred rupees, formed the whole of the grantor's estate, are between Rs. 15 to 20,000. Assuming that Rs. 15,000 represent the annual profits, we have a young man, not involved in debt, without any motive whatever to induce him to execute a benamee deed in fraud of creditors, entering into a transaction, whereby it is alleged that, in satisfaction of the defendant's claim for dower, amounting to Rs. 1,100, he entirely divests himself of all rights in properties worth at the low rate of ten years' purchase Rs. 1,50,000, and reserving for his own maintenance a pittance of Rs. 50 per mensem. *Prima facie*, and without reference to the evidence for and against the *bona fides* of this deed, such a transfer, for such an inadequate consideration, is, to say the least of it, extremely doubtful. Let us then see what evidence the defendant has adduced to support the case she sets up, whereby she seeks to deprive the plaintiff of her right to inherit, which, but for this deed, she cannot question with any chance of success.

Before entering upon a brief examination of the evidence adduced by the defendant upon whom the *onus* lies, we may remark that her witnesses admit that she was not present when this deed was executed; she was then at Hosseinabad, which, we are informed, is 60 miles from Patna, where the deed was executed.

The defendant has examined seven witnesses, five of whom are subscribing witnesses to the deed. The first witness is Hossein Buksh. He subscribes himself as in service. He is the general attorney of the defendant. He says he was an attesting witness to the deed; that it was executed by Mahomed Ashkaree to Mussamut Asloo in lieu of her dower, and that her possession commenced from the date of the execution of the document. He says, the profits of the properties covered by the deed, after paying the Government revenue, are Rs. 15,600, and that the rents were paid to Mussamut Asloo and her amlah, and that Mahomed Ashkaree had nothing to do with the properties after the execution of the deed. This witness at the

end of his deposition says that the mokurree deed was made over by Mahomed Ashkaree not to the grantee, Mussamut Asloo, but to Shah Ahmed Hossein, his general attorney, and therefore Mussamut Asloo did not get it. This statement is important, for it is admitted that Shah Ahmed Hossein is now in the service of the plaintiff. The original deed, therefore, if this witness is speaking the truth, would not be in the custody of the defendant Mussamut Asloo, but it is produced by her Counsel in this Court for the first time during the argument.

The next witness is Bhyrub Lall. He says, he has been the dewan of the defendant, Mussamut Asloo, for the last twenty-five or twenty-six years; he is also a subscribing witness to the deed; and states that it was executed in lieu of dower; that the grantee had possession from the date of the deed and is still in possession. The witness is not aware of the contents of the document, or whether it was read over to Mussamut Asloo; states that Mahomed Ashkaree and Asloo were husband and wife, "what should he the witness know." The witness then contradicts himself on a material point. He first says, Asloo was at Patna when the deed was executed; then that she was at Hosseinabad. He then says that, after the execution of the mokurree, the whole of the collections and disbursements were made by Mussamut Asloo, and that Mahomed Ashkaree would take nothing but the Rs. 600 stipulated for.

The next witness, Ahmed Hossein, is related to both parties. He is clearly an interested witness, for he has received from Mussamut Asloo a lease of one half of the properties covered by the mokurree deed for twenty years on the most favorable terms. He pays to the lessor, Mussamut Asloo, Rs. 2000, and on account of Government revenue Rs. 10,000, so that his profits on the half share are about Rs. 8,000 per annum.

This witness was not present at the execution of the document, but he speaks of the possession of Mussamut Asloo from the date of its execution. He also supports her by volunteering an opinion that "amongst Sheah Sect widows without issue also get the immoveable properties for life." Is not aware to whose order money was paid, whether on that of Mahomed Ashkaree or Mussamut Asloo, after the departure on pilgrimage; nor does he know to whom the money would go.

The next witness is Haring Lall, a subscribing witness to the deed. This witness is in the service of the defendant Mussamut Asloo since 1274 Fuslee, as a jumma-wassil-bakee writer. He goes further than the former witnesses, and states that the document was genuine, and was executed without any view to meet any exigency of the time, and that since the execution of the deed Mussamut Asloo has been in possession in her own right. The witness filed jumma-wassil-bakee accounts.

The next witness is Beekun Lall. He is also a subscribing witness to the deed. He is interested as holding a ticca of a share in one of the villages covered by the deed, the rent of which he pays to Mussamut Asloo.

He speaks to the genuineness of the deed, and to Mussamut Asloo's possession from the date of its execution.

The next witness is Ekbal Hossein, a subscribing witness to the deed; states that he is related to both parties. First says that Mussamut Asloo had possession from the time of the execution of the deed, and then that he does not know if the properties in fact remained in possession of Mahomed Ashkaree or of Mussamut Asloo.

The last witness is Ali Mughher, who says he was a general mookhtear of both Mahomed Ashkaree and Mussamut Asloo. This witness was not present when the deed was executed, but he says that the grantor informed him that he had executed the document; speaks to Mussamut Asloo's possession. The witness is shewn a copy of a petition dated 4th October 1869, purporting to have been filed on behalf of Mahomed Ashkaree through a pleader, and says that a petition to the effect of the petition shown to him was filed, bearing the signature of the witness. This witness is also interested as a ticcadar paying rent to Mussamut Asloo.

This is the oral evidence adduced by the defendant. In support of the allegation of possession from the date of the execution of the deed, the defendant has put in jumma-wassil-bakees in which her name appears as the owner of the property; kubooleuts and receipts of Ahmed Hossein, the mookhtear of Mahomed Ashkaree, for the Government rent reserved by the deed. All these documents are consistent with either theory, viz., that Mahomed Ashkaree remained the

beneficial owner, while Asloo was only the ostensible owner, or *vice versa*. Then some proceedings of Civil Courts have been put in, in which Mussamut Asloo appears as a party. This is after the husband's death, and she appears to have been arrayed amongst the parties as the widow of Mahomed Ashkaree for the purposes of those suits.

Then we have copy of a vakalutnamah, dated 4th October 1869. This document purports to have been executed by Mahomed Ashkaree by the hand of Ali Mughher, who has been examined in this case. Now Mahomed Ashkaree died at Kurrachee on the 3rd of October 1869, or the day before this vakalutnamah is alleged to have been executed. In the vakalutnamah the fact of the mokururee deed having been granted to Mussamut Asloo in lieu of her dower with the reservation of Rs. 600 to be paid to Mahomed Ashkaree is recited. On the same date, a petition is presented on the strength of this vakalutnamah on behalf of Mahomed Ashkaree, stating that he had granted the mokururee to Mussamut Asloo in lieu of her dower, and that she is in possession.

It must be remembered that nothing was done by Mahomed Ashkaree during his lifetime,—and he lived nearly three years after executing the deed,—in the way of putting forth his wife in the Courts as the party entitled to an absolute right in the estates covered by the mokururee deed. A day before his death a vakalutnamah is executed by a mookhtear whose power of attorney is not produced, and a petition is put in in a petty case in a Moonsiff's Court to the effect that, on the 4th October 1869, when Mahomed Ashkaree was dead, he acknowledges the execution of the deed and the possession of Mussamut Asloo.

It may be said that the fact that the original deed has been produced by the defendant shows that the transaction was a real one and that possession passed, as it is not usual in benamtee transactions for the title deeds to be given up by the beneficial owner. On this part of the case, we are clearly of opinion that, during the lifetime of Mahomed Ashkaree, the deed never was in the hands of the defendant. Had it been delivered to her as she states, she would have produced it with her written statement. One of her witnesses says the original deed was made over to Ahmed Hossein, who has

gone over to the plaintiff's side. Be that as it may, it is clear that the original document has only been very recently discovered by the defendant.

The plaintiff has examined several witnesses, some of them related to both parties, who depose to the effect that the mokururee was a sham; that Asloo never had possession; and that all rights of ownership over the properties were exercised by Mahomed Ashkaree during her lifetime. Some letters have been put in by the plaintiff, some of them written by Mahomed Ashkaree during his absence from home on a pilgrimage to Mecca. These letters were not objected to below, and they show that the mookhtears of Mahomed Ashkaree, and not of Mussamut Asloo, were addressed by him as to the management of the estate during his absence and the remittance of money to him. This would not have been the case if Mussamut Asloo had been the owner, for the letters would, in that case, have been addressed to Waiz Hossein, who was admittedly her mookhtear.

The *onus* being on the defendant, we think that she has wholly failed to prove that the mokururee deed was executed with the intention that it should operate in her favor, or that she ever had possession of the properties in dispute during the lifetime of her husband.

In this view of the case, it is quite unnecessary to enter into the question as to what construction ought to be put upon the conditions of the deed.

In the course of the argument, it was admitted by the Counsel for the respondent that the defendant, appellant, has a just claim on account of dower, the amount of which is not disputed, and that the dower is a charge on the estate of her late husband. Before, therefore, the plaintiff can be entitled to take possession of the estate, or of any portion of it, we think it equitable to direct that an account be taken between the parties. The Court below will ascertain what is due by the plaintiff to the defendant on account of her dower which was payable under the Mahomedan law on the death of her husband, with interest from the date of his death to the present time at the rate of 12 per cent. per annum. An account will also be made of the amount of mesue profits received by the defendant on account of plaintiff's share in the estate from the

date of the death of the husband of the defendant to the present time, upon which, after deducting collection charges at 10 per cent., interest must be charged to the defendant at the rate of 6 per cent. per annum. If any amount be due to the defendant on account of her dower calculated according to the above principles, after setting off what is due to the plaintiff on account of mesue profits, it must be paid by the plaintiff before she is put in possession.

It has been contended that this Court cannot direct an account to be taken, but must refer the plaintiff to a separate suit. Two cases were referred to in support of this argument. We think we should be wrong in putting the parties to further expense. The cases referred to are cases in which the widow was in possession in virtue of a lien over the property of her husband on account of her dower, and in which the amount of dower was either disputed or was uncertain. In this case the amount of dower is not disputed, and the defendant does not claim to be in possession by virtue of a lien on account of her dower, but as absolute owner under a mokururee deed which she says was executed in lieu of her dower.

We think that the cross-appeal of the plaintiff must be dismissed in as far as the moveable property is concerned, as well as with reference to the small sum covered by the *zur-i-peshgee*. The decision of the Subordinate Judge in the matter of the mesne profits must be modified,—this will be calculated, as stated above, from the date of the death of Mahomed Ashkaree.

We, therefore, declare that the mokururee deed set up by the defendant was not executed with the intention that it should operate; that the defendant was never in possession of the estate of her husband during his lifetime; and that her possession since his death has been without right.

The plaintiff will be entitled to possession of the share in the properties claimed after an account has been taken by the Lower Court on the principle stated above, and the conditions laid down by this Court have been fulfilled. The defendant, appellant, must pay the costs of both Courts, including the costs of the cross-appeal in proportion to the amount decreed to the plaintiff.

The 23rd July 1873.

Present:

The Hon'ble Louis S. Jackson and E. G. Birch, Judges.

Cause of Action—Misjoinder—Jurisdiction.

Case No. 1381 of 1872.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 18th April 1872, reversing a decision of the Sudder Moonsiff of that district, dated the 20th July 1871.

Mohesh Chunder Pal Chowdhry and others
(Plaintiffs) Appellants,

versus

Trilochun Chuckerbutty (Defendant)
Respondent.

Baboo Rash Beharee Ghose for Appellants.

Baboos Sreenath Banerjee, Huree Mohun Chuckerbutty, and Bykunt Nath Doss for Respondent.

The father of defendant No. 2, the father of plaintiff No. 2, and plaintiffs 1, 3, and 4 jointly obtained an order to recover Rs. 208 from the Collectorate on account of costs, realized the sum in execution of decree, and then kept the money in deposit with defendant No. 1, who was pleader for two of the plaintiffs, with a view to subsequent distribution. Plaintiffs then demanded from the said defendant on account of their four shares Rs. 166. He refused to pay the money, and they served him with a notice and sued him. The first Court decreed a part of the claim; both parties appealed, and the Subordinate Judge dismissed the suit on the ground of misjoinder, inasmuch as the claim of two of the plaintiffs respected the defendant as their pleader, and that of two others respected him as a depository.

HELD that the suit was beyond the competence of a Small Cause Court, and there was no reason why plaintiffs should have resorted to two separate suits to obtain an adjudication which might conveniently be obtained in one.

Jackson, J.—It seems to us that the decision of the Lower Appellate Court in this case is erroneous. The suit as it was framed involved two questions; firstly, whether the money which the plaintiffs sought to recover was in the hands of defendant No. 1 under the circumstances stated; and, secondly, if it was, how much of

that money were the plaintiffs entitled to as between them and the defendant No. 2. This suit was, it seems to us, manifestly one beyond the competence of the Court of Small Causes to try. It seems to have been the opinion of the Court below that there was a misjoinder in the case, and clearly if the plaintiffs were to sue the defendant No. 1 *simpliciter* for the money, that suit must have been preceded by another suit against the defendant No. 2 for declaration of the shares to which the plaintiffs were entitled. We cannot see why the plaintiffs should be obliged to resort to two separate suits to obtain an adjudication which might conveniently be obtained in one. The decision of the Subordinate Judge must be reversed, and the case go back to his Court in order that he may try it on the merits. The costs of this appeal will abide the result.

The 25th July 1873.

Present:

The Hon'ble E. G. Birch, Judge.

Unstamped Sunnuds—Receipts—Evidence.

Case No. 1568 of 1872.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 18th July 1872, reversing a decision of the Assistant Commissioner of Hazareebagh, dated the 23rd March 1872.

Gunput Lall and others (Defendants)
Appellants,

versus

Bhunjoo Mahto and another (Plaintiffs)
Respondents.

Baboo Nil Madhub Sen for Appellants.

Baboo Boodh Sen Singh for Respondents.

The Lower Appellate Court was held to have done wrong in rejecting as inadmissible, because on plain paper and unattested, sunnuds which had been filed in

a previous suit between the same parties and the authenticity of which had then been established and had never since been impeached; and also in rejecting receipts which had been similarly filed before and had not been impugned.

Birch, J.—In this case, the Judicial Commissioner has reversed the decision of the Assistant Commissioner on the ground that the sunnud upon which the Lower Court relied was on plain paper and unattested. This document the Lower Appellate Court at once rejected as inadmissible. The receipts were also rejected as unattested, and are said not to be receipts but jumma-wassil-bakee papers. The other ground upon which the Lower Appellate Court reversed the decision of the first Court was that the defendant's documents rebutted the presumption that the defendants had held their tenure at an uniform rate from the time of the decennial settlement.

The Lower Appellate Court was wrong in rejecting the sunnud as inadmissible because it was on plain paper and unattested. That and other sunnuds had been filed in a previous suit No. 105 of 1868/69, between the same parties, and their authenticity had been established to the satisfaction of the officer deciding that case, and the correctness of that finding has never been impeached. The receipts the Lower Appellate Court summarily rejected, but in the judgment of the Court of first instance I find it stated—"The genuineness of none of these receipts is questioned," and it must be borne in mind that these receipts were filed in case No. 105 of 1868/69, and were duly proved in that case.

Under such circumstances, I consider that the Lower Appellate Court was wrong in rejecting the sunnuds and receipts upon which the first Court had relied. There are three sunnuds produced, those of later date confirming the previous grant. The first sunnud bears date 1865 sumbut, 65 years ago: it recites the former possession of the grantees (defendant's ancestors) at that date, and 'sets forth that the rent of their tenure shall never be enhanced. The same terms occur in the confirming grants. The plaintiffs in this case hold the village in which the defendant's land lies under a pottah from the proprietors (whose ancestors granted the first sunnud, and who themselves gave the confirming grants) and can have no right under the circumstances to enhance the defendant's rent.

The decision of the Lower Appellate Court is reversed, and the order of the first Court dismissing the suit is restored.

The 26th July 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Transferred Decree—Jurisdiction—Act VIII of 1859 s. 208—Act XXIII of 1861 s. 11.

• Case No. 9 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 29th September 1871.

Abedoonissa Khatoon (Defendant) *Appellant*,

versus

Ameeroonissa Khatoon (Plaintiff)
Respondent.

Mr. J. T. Woodroffe for Appellant.

The Advocate-General for Respondent.

W A sued his father A to set aside certain deeds and leases alleged to have been made by A, and to recover the lands purported to be conveyed. The decision was in favor of A, and W A appealed to the High Court. Pending the appeal, W A died, and the Court permitted his widow to prosecute it as his legal representative for that purpose. The appeal was decreed, and the heirs and representatives of W A declared entitled to a decree, leaving open the question who was to have the benefit. In the execution proceedings the Judge tried the question whether Wajid was the son of W A, and decided that he was not. In a Miscellaneous Appeal, the High Court proceeding as if under Act XXIII of 1861 s. 11 reversed this decision:

Held that the proceeding was in reality one by the widow as guardian of W A, and if allowable at all would be under Act VIII of 1859 s. 208; but in a proceeding under that section, the Court would not have power to determine who is the representative of a decree transferred by operation of law when there is a contest about it.

Couch, C.J.—This is an appeal from the decree of the Subordinate Judge of Dacca, by which he ordered that the suit, so far as it sought to declare that Wajid Ali was not the son of the principal defendant Abedoonissa Khatoon and of Wahed Ali, her husband, should be decreed.

Wahed Ali, the husband of the defendant (we will hereafter call her the defendant

only and the principal defendant) instituted a suit against his father, Abdool Ali, to set aside certain ikrarnamahs and meeras pottahs which were alleged to have been made by him, but of which he denied the execution, and to recover the lands which those pottahs purported to convey. The decision was in favor of Abdool Ali, and Wahed Ali appealed to this Court against it.

Pending the appeal, Wahed Ali died, and this Court admitted the defendant to prosecute it as his legal representative for that purpose, not deciding any question as to who was the legal representative. A decree was made by this Court upon the appeal, declaring that the heirs and representatives of Wahed Ali were entitled to a decree for setting aside the documents which were the subject of the suit. It is set out at page 304 of the paper-book. The decree of the Court below was reversed with costs, and the learned Judges say:—"Confining ourselves to the matters in issue in the present suit, our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents. We shall declare that Moulvee Wahed Ali was in his lifetime, and that those who are now by law his heirs and representatives, are entitled to a decree for setting aside the documents relied upon by the respondents, and for the recovery of the property sued for." Therefore, that decree left open the question who was to have the benefit of it. It merely said they were to be the heirs and representatives of Wahed Ali. That decree was appealed from to Her Majesty in Council, and we are informed that the appeal is still pending.

Proceedings were taken before the Judge of Dacca, which are set out at page 429 of the paper-book. It is called execution case No. 29 of 1869, and it was between Abedoonissa, the defendant, who is called decree-holder, and Ameeroonnissa and others, who are called debtors. The question tried in that proceeding was whether Wajid Ali was the son of Wahed Ali, and entitled to the benefit of the decree.

It was not correct to say that Abedoonissa was the decree-holder. She was so far a decree-holder as that she had been admitted by the High Court to prosecute the suit on behalf of the party who had been proved to be entitled to a decree; but it remained to be determined who was really the decree-holder, that is, entitled to the benefit of the decree.

The Judge of Dacca said in his judgment that he had no hesitation in declaring against the decree-holder Abedoonissa:—"It appears to me established beyond all reasonable doubt that the child called Wajid Ali is not the son of her deceased husband Wahed Ali and herself, but the son of a man named Sadoo, who has presented himself in Court and claims paternity of the child by his lawful wife." He gave his reason for coming to that conclusion, and concluded by saying that he had not the smallest doubt left but that the assertion that the boy Wajid Ali was the child of Abedoonissa was a shameless attempt at imposture, and he recorded his sanction for any criminal prosecution that might be instituted against Hameedooddeen and Abedoonissa, the former being her father. There was an appeal to this Court, which was heard before Mr. Justice Loch and Sir Charles Hobhouse. It is called a Miscellaneous, Regular Appeal from a decision passed by the Officiating Judge of Dacca, dated the 29th of August 1869. These proceedings are treated as proceedings in execution of decree, and under Section 11 of Act XXIII of 1861. Those learned Judges, in a very lengthy judgment, gave their reasons for coming to the conclusion that the decision of Sir William Herschel, the Judge of Dacca, was not correct, and for thinking it was proved that Wajid Ali was the legitimate son of Wahed Ali, and reversed the decision.

It is most convenient to consider here what effect ought to be given in the present suit to this judgment of the High Court. It was not really a proceeding between the parties to the original suit so as to come within the words of Section 11 of Act XXIII of 1861. In its terms it was, because it is said to be between Abedoonissa and Ameeroonnissa; but in reality it was a proceeding by Abedoonissa on behalf and as the guardian of Wajid Ali. And the object was to establish that Wajid Ali, as the heir of Wahed Ali, ought to be allowed to come in and be made a party to the suit in order to have the benefit of the decree. If the proceeding were allowable at all, it would be under Section 208 of the Procedure Code, which enables a Court, when a decree has been transferred by assignment or by operation of law from the decree-holder to any other person, to grant an application on the part of the person to whom it has been transferred for the decree to be executed in the same manner as if it had been made by the original decree-holder. The words of the Section do not strictly

apply, for Wahed Ali died before the decree was passed; but from the mode of proceeding which had been allowed by this Court we think it must be considered as if he was the decree-holder; represented by Abedoonissa, who was allowed to conduct the suit after his death.

But in a proceeding under Section 208, the Court has not, it appears to us, power to determine who is the representative or person to whom the decree has been transferred by operation of law when there is a contest about it.

If there is any dispute as to who is the transferee of the decree, such as this was,—where the question was who was the heir of Wahed Ali and entitled by law to stand in his place as decree-holder,—it ought to be determined by a regular suit. And when determined in that way, the Court would give effect to the decision and allow the person to execute the decree who is declared entitled to do so. It appears to us that these proceedings, which seem to have been considered as in execution of a decree, and under Section 11 of Act XXIII of 1861, were in reality unauthorized by that Section, and cannot be considered as having the effect which a proceeding under that Section would have.

It is doubtful whether the decision of the Judge of Dacca was open to an appeal at all, and whether the learned Judges who reversed it had any authority to do so. But that is not important, for according to the view which we take, he had no power to make such an order, and his decision against the legitimacy of Wajid Ali was of no more value than the decision of Mr. Justice Loch and Sir Charles Hobhouse in favor of it. We, therefore, think the judgment of the High Court is not binding upon the plaintiff in this suit. And if we were to use it as affording any assistance to us in coming to a conclusion upon the facts, we have on the other side the decision of Sir William Herschel, who had all the persons before him and saw their demeanour and the manner in which they gave their evidence, and who (it may be said without disrespect to the learned Judges of this Court) was as capable of coming to a right conclusion upon the matter of fact as they were. We have, therefore, to consider whether, upon the evidence in this suit, Wajid Ali is proved to be the son of Wahed Ali.

Upon that we have a judgment which it appears to us is entitled to great consideration.

The suit was tried by a Subordinate Judge, who is a Mahomedan gentleman, and able to form a very good opinion upon the probability of the case put forward by the defendant, and credit which ought to be given to the witnesses. He has, after an apparently very careful investigation, come to the conclusion that Wajid Ali is not the son of Wahed Ali. The defendant has appealed to this Court, and we are bound to form our opinion upon the evidence in the case. We have done so, but it is not unimportant that the case was decided by such a Judge as the Subordinate Judge is.

Before considering the main question of fact in the case, it may be well to dispose of a point which was raised on behalf of the appellant as to Abdool Ali having disinherited his son Wahed Ali, and consequently not being able himself now to claim to be his heir.

Some evidence was given on that subject, which is to be found at page 342 of the paper-book. Supposing all that was deposed to by the witnesses on this subject to be true, no authority has been cited to us (and it appeared to be admitted by Mr. Woodroffe that he could not produce any) that it would by Mahomedan law have the effect of disinheriting Wahed Ali. The Subordinate Judge in his judgment upon this part of the case said, that what had been produced on the part of the defendant was not sufficient evidence under the Mahomedan law of a disinheritance, and he considered that the evidence did not show that there was that renouncing or discarding of Wahed Ali by his father which would have the effect of disinheriting him, and consequently have the effect of preventing the father from inheriting any property of the son; and as we have said, it has not been shown to this Court that this view of the law is not correct, we have therefore to consider the real question in the case, namely, was Wajid Ali the son of Wahed Ali.

[The Chief Justice then entered very fully into a consideration of the evidence in the case, and concluded as follows]:—

After reviewing all the evidence which has been produced, we think it is impossible for this Court to say that the conclusion which the Subordinate Judge came to was wrong. We may not concur in all the observations that he made in his judgment, but we think it is supported by the evidence, and that we ought to dismiss this appeal with costs.

The 28th July 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Judgment—Decree—Execution.

Case No. 1928 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 28th August 1872, affirming a decision of the Subordinate Judge of that district, dated the 22nd January 1872.

Motee Lall Singh (Defendant) *Appellant,*
versus

Petam Kooer (Plaintiff) *Respondent.*

Baboos Doorga Mohun Doss and Kashee Kant Sen for Appellant.

Mr. C. Jackson and Baboos Romesh Chunder Mitter and Kalee Mohun Doss for Respondent.

Where the judgment of a Court indicates any intention which would not be authorized by the law, and which was not embodied in the decree, the Court executing has more reason to be bound by the decree than by the judgment.

Jackson, J.—It seems sufficient for the decision of this appeal to say that in our opinion the decree dated the 18th September 1867, which is relied on by the plaintiff in this case, does not bear the construction which has been put upon it by the Lower Appellate Court. A suit was brought against certain persons, one of whom was the representative of one Brojo Ruttan, and the others were his coparceners, to recover a sum of money which had been lent to Brojo Ruttan and applied to purposes of the coparcenary, and a decree was passed against the defendants. This decree contained words to the effect that the amount should be levied out of the joint property. It has been contended that there are no words in the decree which specifically allowed any property other than the joint property to be seized in execution. To this it is sufficient to answer that there was no necessity for inserting any such clause. The defendants having been found liable, execution must necessarily proceed against them in the modes provided in the Civil Procedure Code. But it is said that we are to read the decree by the light of the judgment which preceded it, and that so reading it we shall find that it was the manifest intention of the Court not to allow execution against anything but joint property. As to that we should say, as we

said in the course of the argument, that if the judgment of the Court indicated any intention which would not be authorized by the law, and which was not embodied in the decree, it is the more reason why one should prefer to go and should be bound to go by the decree which is right than by the judgment which is erroneous. We think, therefore, that not only the joint property but all the property in the possession of the plaintiff which came to her as representative of her deceased father was liable to be proceeded against, and that consequently the ground on which the suit was brought entirely fails. There is another ground which is not taken in the petition of special appeal, but which the vakeel for the special appellant asked leave of the Court to take, *viz.*, that the question raised by the plaintiff in this suit is one which ought to have been finally decided by the Court executing the decree, and not in a suit separately brought, as provided by Section 11 Act XXIII of 1861. It is not necessary, however, that we should determine this question, for the point already disposed of is sufficient for the determination of this suit.

The decrees of the Lower Courts must be reversed, and the plaintiff's suit dismissed with costs.

The 28th July 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Khamut Lands—Right of Occupancy—Act X of 1859 s. 6.

Case No. 1795 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 27th July 1872, affirming a decision of the Moonsiff of Monghyr, dated the 28th March 1872.

Bhugwan Bhagut and another (Defendants) *Appellants,*
versus

Jug Mohun Roy and others (Plaintiffs) *Respondents.*

Moonshee Mahomed Yusoof for Appellants.

Baboo Kalee Kishen Sen for Respondents.

Where khamut land is let by a zemindar for a term of years, and upon the expiration of that term tacitly let to the same tenant from year to year for a long period, the tenant does not thereby acquire a right of occupancy.

Phear, J.—THE Judge states the facts of the case as follows :—“The lands held by plaintiff were originally khamut; that Chukerdhari's father gave them in lease to plaintiff's father, and that on the lapse of the lease, the occupation had continued for a period of upwards of 20 years.

“This being the case,” the Judge goes on to say, “I have no doubt whatever in deciding that the plaintiff has acquired rights of occupancy notwithstanding his being styled a ryot of khodkast lands, and notwithstanding the land having been originally khamut. The exception with regard to neej-jote and khamut lands in Section 6 of the Act was merely made to defend the zemindar's rights when he let such lands for a short period. It did not prevent him from creating holdings in such lands.”

We think that the Judge is so far right in this last passage that unquestionably the Act did not prevent the zemindar from creating a holding in his neej-jote or khamut land if he chose. But that has not been the case here. According to the finding of fact come to by the Judge, the land had been first let to the plaintiff for a term of years, and upon the expiration of that term it was tacitly let to him from year to year. There is no other alternative to this excepting that of the zemindar cultivating the land himself by the hands of his servants, or the defendant being a trespasser. Now letting the land for a term, or from year by year, for a considerable period, does not of itself alter the character of the land. And it was, as it seems to us, the express purpose of the Legislature in this Section to prevent the zemindar's rights in this particular class of lands from being invaded or restricted by the growth of the occupancy rights on the part of a ryot to whom he had let it for periods equal to or exceeding 12 years. The very words of the Section are :—“This rule does not apply to khamut, neej-jote, or seer land belonging to the proprietor of the estate or tenure and let by him on lease for a term or year by year.” * * *

In the present case the land was let by the zemindar for a term, and then on the expiration of the term from year to year throughout a long period; and it seems that it is consideration of the length of this period which has led the Judge to think that the plaintiff had, upon the foundation of it, acquired a right of occupancy. It appears to us, however, very plain that it is to just such a case as this that the words of the Section were directed. The Judge appears

to have given to the plaintiff a right of occupancy upon the very ground, and for the very cause which the words of Section 6 of the Act expressly say shall not give him a right of occupancy.

We think that the appeal must be upheld, the decree of the Lower Appellate Court must be reversed, and the plaintiff's suit must be dismissed with costs in all the Courts.

The 23th July 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,

Judges.

Principal and Agent—Balance of Account—Cause of Action.

Case No. 1959 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 11th September 1872, affirming a decision of the Officiating Additional Sudder Moonsiff of that district, dated the 23rd February 1872.

Syfoollah Khan (Plaintiff) *Appellant,*

versus

Jhapa Thakoor (Defendant) *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboos Doorga Mohun Doss and Taruck Nath Sen for Respondent.

Where an account is rendered by an agent after the period of his agency has come to an end, and a balance struck and agreed upon as due by him to the principal, such balance may constitute a cause of action against the agent.

Phear, J.—We think that there has been altogether a miscarriage in this case, and that

it ought to go back to the first Court for the purpose of a trial *de novo*. In truth, there has been no trial yet of the matter in dispute between the parties. It appears that the plaint was filed in September 1870. The Moonsiff took the evidence on both sides in February 1871, but he postponed the delivering of judgment until December of that year. He appears to have been relieved about that time from his duties by another Moonsiff, to whom he handed over the case without any judgment whatever. The second Moonsiff took up the case in February 1872, and then dismissed the suit upon the preliminary issue of limitation.

It seems to us that this extraordinary proceeding is not in reality a trial of the matter in suit between the parties. It also seems to us that a mistake has been made in the Lower Courts with regard to the true nature of the cause of action. This was not a suit, as we understand the plaint, which called upon the defendant to account: nor was it a suit to recover a specific sum of money on the ground that it had come to the defendant's hands during the period of his agency. The plaint distinctly alleged that the defendant, after the period of his agency had come to an end, had rendered his accounts to the plaintiff; that in his presence a balance was struck; and that although he did not agree to the correctness of that balance at that time, yet he did afterwards give his consent thereto in the shape of a letter written by him to the plaintiff.

This case may or may not be a true case. But if the plaintiff can establish it by his evidence, then it constitutes a cause of action against the defendant, not within the scope of Section 30 Act VIII of 1869 B.C., but upon the general ground that a balance of account had been stated and agreed to by the defendant as due by him to the plaintiff. This of itself was a cause of action upon which the plaintiff would have a right to sue for the amount which had been so agreed to.

It appears to us that the decisions of the Lower Courts must be reversed, and the case remanded to the Lower Appellate Court in order that it may send it down to the first Court for re-trial. Both parties will have liberty to adduce such evidence as they think in support of their case. Costs of all the Courts must abide the event.

The 29th July 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Kobala—Registration.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Beerbhoom, dated the 24th July 1872, affirming a decision of the Moonsiff of Boupore, dated the 1st February 1872.

Kalee Churn Mundul and others (Defendants)

Appellants,

versus

Haradhun Pal (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Sreenath Dass for Respondent.

In a suit for declaration of title to property of which defendants had recovered possession under Act XIV of 1859 s. 15, where plaintiff's only evidence of title was an unregistered kobala, HELD that such kobala could not be given in evidence, nor could it affect property comprised in it.

Couch, C.J.—THE defendants have recovered possession of the tank in dispute under Section 15 of Act XIV of 1859. Whether the decision giving them possession is right or not, we have nothing to do with.

The plaintiff, in order to recover possession from the defendants, must establish his title. The title which he set up is derived from Luckhee Monee, who is found to have been in possession for a long time, and her predecessors before her. The plaintiff's title is derived from her by a kobala which was made in 1869, and has not been registered. The Registration Act is imperative, that if such a kobala as this is not registered, it cannot be given in evidence, nor can it affect any property comprised in it. The plaintiff therefore cannot show that the title which there may have been in Luckhee Monee has passed to him. As we have said during the argument, we cannot connect his possession with that of Luckhee Monee except by means of the kobala. Although there may have been such a long continued possession by Luckhee Monee and her predecessors as would be evidence of title sufficient to enable them to recover possession from the defendants, it cannot be said that the plaintiff's possession since 1869 is, alone and unsupported,

evidence which would entitle him to recover the possession. Possibly this is a hard case, but it is owing to the stringent provisions of the Registration law, that the plaintiff is unable to prove a title which he probably really has. The decisions of the Lower Courts must be reversed, and the plaintiff's suit dismissed, but we think without costs.

The 29th July 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Arbitration Award—Judgment—Appeal—Act VIII of 1859 ss. 324 & 325.

Case No. 1718 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 10th July 1872, affirming a decision of the Moonsiff of Bishenpore, dated the 30th September 1871.

Gunga Narain Ghose and others (Plaintiffs)
Appellants,

versus

Ram Chand Ghose and others (Defendants)
Respondents.

Mr. G. Gregory for Appellants.

Baboo Romesh Chunder Mitter for Respondents.

Where a Moonsiff, instead of allowing ten days, as provided in Act VIII of 1859 s. 324, ordered that the objections to an arbitration award should be filed in one day; and, this having been done, delivered a judgment upon the merits, which was also in accordance with the award,—

Held that the judgment could not be considered as one under s. 325, which is declared to be final, but a judgment which is open to appeal.

Couch, C.J.—THE reason for the Judge's dismissing the appeal is given in a few words. He says that the Moonsiff's proceeding contains much surplusage, but that does not prevent it from being a judgment according to the award. But the whole question is whether that part of the Moonsiff's judgment in which he refers to the evidence in the case, and professes to be founding his decision upon it and not upon the award, can be considered as surplusage,—whether the fair construction of his judgment is not that he considered the case as it was proved and

having done that brought in the award, not as the sole foundation of his judgment, but as confirming the view which he had taken in the previous part of it. Even if all the proceedings in the arbitration had been regular, this would probably be the most natural construction to put upon the judgment, for if the Moonsiff was doing only what the Act requires, giving a judgment according to an award which he had decided ought not to be set aside, all he had to do was to state that he gave his judgment according to the award, and to make the decree in conformity with it. We do not think we ought to suppose that he introduced into his judgment all the other matter without some reason.

But when we look at the proceedings, there is good reason for holding that this judgment was not merely a judgment upon the award. By Section 324 of the Civil Procedure Code, the plaintiff had ten days to apply to set aside the award. The Moonsiff, disregarding that, made an order that the objections to the award should be filed within one day. It was not to be expected that the plaintiff would disregard that order, irregular and improper as it was, and his filing his objections cannot be considered a waiver of the irregularity. He never consented to take less than the time which the law allowed him. He did not voluntarily file his objections in one day, but upon the compulsion of the order of the Moonsiff. And although he had given in his objections, the Moonsiff ought, we think, to have waited until the expiration of the ten days before he gave a judgment, if he intended to give it as upon the award.

The law allows ten days, and it appears to us that the decision which is referred to in Mr. Broughton's Edition of the Procedure Code, is, if we may be allowed to say so of the decision of another High Court, a right one.

We think we must consider the irregularity of the proceeding when we are determining the nature of the judgment. It appears to us that the Moonsiff did not determine to proceed strictly under the Act as upon the award, and that he thought, as we have observed on other occasions Moonsiffs have done, that the fairest and best mode of treating the matter was to see whether in his judgment the award was a right one. Accordingly he gave what he considered a right decision upon the merits which was also in accordance with the award. We must not consider that as a judgment under Sec-

tion 325, which is declared to be final, but a judgment which is open to appeal. In order to make it final under Section 325, we think it should appear that all the proceedings have been regular, and the directions of the Act have been complied with, which they were not in this case.

We therefore think that the decision of the Judge was wrong. His decree must be reversed, and the case must be remanded to him for retrial. The costs will follow the result.

The 29th July 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Certificates under Act XXVII of 1860—Appeal—Right of Action.

Case No. 82 of 1873.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 23rd December 1873.

Tarinee Churn Brohmo (Petitioner)
Appellant,

versus

Roma Soonduree Dossee (Objector)
Respondent.

Mr. J. T. Woodroffe and Baboos Sham Lal Mitter and Gooroo Doss Banerjee
for Appellant.

Mr. Montriou and Baboos Romesh Chunder Mitter, Amarendra Nath Chatterjee, Kumlakant Sen, and Protap Chunder Mojoomdar for Respondent.

An appeal lies from the result of an enquiry, or omission to make an enquiry, under Act XXVII of 1860. An inquiry under this Act is conclusive for the purposes of a certificate; but the right of any other person to recover moneys by a regular suit against the persons to whom it has been paid, is not affected.

Jackson, J.—We have no doubt whatever that an appeal lies from the result of an enquiry, or omission to make an enquiry, under this Act. Section 6 declares that the granting of a certificate may be suspended by an appeal to the Sudder Court. We understand that to mean that there may be an appeal, and that on such appeal the Court may suspend the granting of the certificate, or may declare the party to whom the

certificate should be granted, or may direct such further proceedings for the investigation of the title as it thinks fit. That it seems to us merely recognizes and declares the power of the Court to superintend the proceedings of the District Court, and enable parties to have the benefit of that superintendence by way of appeal. That being the case, we think it is impossible to doubt that we ought in this case to direct the completion of the enquiry. The Judge of the District Court appears to have heard a portion of the evidence, and having adjourned the hearing to a subsequent day to have taken up the case and recorded his judgment without hearing the remainder of the evidence or the arguments of the Counsel engaged. This is an error which, in our opinion, vitiates the whole proceedings, although the contention on the other side is that no wrong has been done to any party by the Judge's omission to hear the arguments of counsel. It has been suggested too that the enquiry before the Judge was a mere summary enquiry, and that any order passed by the Judge in such a proceeding is liable to be set aside by a regular suit. We are not aware that this is so. An enquiry under this Act is conclusive for the purposes of a certificate, but it is provided by Section 9 that the right of any other person to recover the whole or any part of the monies paid, by a regular suit against all or any of the persons to whom the same have been paid, shall not be affected by this Act. Beyond that we are not aware that an order under this Act is to be looked upon as summary. On the contrary, it is the duty of the Court to declare the rights of parties to a certificate and to grant the same. In a previous case of this description I have stated my opinion that the enquiry necessary under this Act must be as complete as any other enquiry to be conducted by a Civil Court. It is impossible otherwise than by the exercise of that moral influence which the Court certainly ought to possess, for any Court to impose a limitation upon the latitude which the law allows parties in proving their case.

In the present case, investigation seems to have broken off in the midst by the order of the Judge, and we think the proceedings must go back to the District Court in order that the enquiry may be completed, and the Judge determine, after hearing the evidence and the arguments of counsel, which party is entitled to the certificate.

We should add that it has been stated before us that several of the witnesses on

the side of Tarinee Churn were heard. Now it appears that those witnesses were chiefly *purdanushēen* ladies. There is a considerable difference in the efficacy of cross-examination between a witness sitting behind the purdah and a witness standing in the witness-box before the Court, and we are not at all surprized that parties should be dissatisfied with the order in a case where the evidence is concluded at a point where effective cross-examination would have just commenced.

The costs of this appeal will abide the ultimate result.

The 29th July 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Review of Predecessor's Judgment—Judgment—Jurisdiction—High Court.

Case No. 1933 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 28th August 1872, affirming a decision of the Moonsiff of Manickgunge, dated the 30th December 1871.

Gour Huree Shaha (Plaintiff) *Appellant*,

versus

Rash Monjee and others (Defendants)
Respondents.

Baboo Gopal Lall Mitter for Appellant.

Baboo Nullit Chunder Sen for Respondents.

Where a District Judge reviews the judgment of his predecessor, and sets it aside, on a ground involving a misconception of the leading facts of the case, his judgment, being in itself erroneous, may be set aside by the High Court without the exercise of its powers of supervision.

Jackson, J.—The case out of which this special appeal arises has taken a somewhat

unusual course. The plaintiff sued to recover from the defendants the sum of Rs. 431, as money overdrawn from joint business. In support of his case, the plaintiff put in his version of the accounts. The defendants also put in a different file of accounts prepared by them, to which it seems the plaintiff had at one time assented and upon which a settlement had taken place; and the present suit seems to be based on subsequent detection of error in those accounts.

The Moonsiff dismissed the suit on the ground that the accounts prepared with the consent of both parties must prevail over those prepared by the plaintiff alone. The case came on appeal before Mr. Abercrombie, a Judge of very considerable experience, who is now officiating as Commissioner of the Division. After he had left office, it seems that an application was made to the present Officiating Judge to review the decision of Mr. Abercrombie, who had given the plaintiff a decree for the sum of Rs. 320 14 annas. That application was granted by the Officiating Judge who proceeded to declare that in his judgment the decision of his predecessor was quite erroneous, and stating his own view of the facts he reversed that decision and restored the decree of the Moonsiff.

Section 376 of the Code of Civil Procedure provides that any person considering himself aggrieved by a decree of a Court of original jurisdiction, or by a decree of a District Court in appeal, from which no special appeal shall have been admitted by the Sudder Court, may apply for a review of judgment by the Court which passed the decree. But Section 378 provides: "If the Court shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review."

It has been held by this Court that a Judge may admit a review of his predecessor's judgment, and the Judicial Committee of the Privy Council, in the case of *Maharajah Mohessur Buksh Singh v. The Bengal Government*, in VII Moore's Indian Appeals, page 304,* observes—"A review is perfectly distinct from an appeal; it is quite clear from the Regulations (and the same remark applies to this Act) that the primary intention of granting a review was a

* 3 W. R., P. C., 45.

"reconsideration of the same subject by the same Judge as contra-distinguished to an appeal, which is a hearing before another tribunal. We do not say that there might not be cases in which a review might take place before another and a different Judge, because death or some other unexpected and unavoidable cause might prevent the Judge who made the decision from reviewing it, but we do say that such exceptions are allowable only *ex necessitate*."

Now, unfortunately in the present case, the entire ground upon which Mr. Garrett's judgment, setting aside that of his predecessor, stands is an absolute misconception of the leading facts of the case. He observes:—"The circumstances of the partnership are admitted to be these, that the defendant supplied all the capital of the business while the plaintiff was the writing manager." Now the plaintiff and the written statement both concur in showing that this was not so, but that the business was carried on with joint funds, and this has been most properly admitted before us by the pleader for the special respondent. Starting upon this erroneous idea, the Officiating Judge has simply sat in appeal on the judgment of his predecessor, and has reversed that judgment on an entirely mistaken ground. To review the judgment of one's predecessor in office, especially when that officer is a Judge of great experience, is a thing which should be undertaken with great caution. It seems to us that the present decision of the Officiating Judge has been precipitate. It might have been expected that in setting aside the judgment of his predecessor he should have applied himself carefully to the arguments on which that judgment rested, and should not have left them unanswered. So far from doing this, he has, it seems, put them entirely on one side. If it were necessary for the purpose we should have been prepared to make use of our superintending powers to set aside a decision passed on review which so entirely contravenes the law in that respect; but it is unnecessary to do so, because the judgment of the Officiating Judge is in itself erroneous, and, as it is now proved, cannot be supported. We, therefore, set aside the judgment, and for the reasons given by Mr. Abercrombie in the first judgment, we again reverse the judgment of the Moonsiff and order that a verdict be entered for the plaintiff for 320 rupees 14 annas 3 pie with costs.

The 29th July 1873.

Present:

The Hon'ble E. G. Birch, Judge.

Estoppel—Conflicting Depositions.

Case No. a37 of 1873.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Dacca, dated the 17th May 1872, reversing a decision of the Moonsiff of Naraingunge, dated the 12th September 1871.

Alam Chand Beparee (Plaintiff)
Appellant,

versus

Sreemutty Pitam Kooer (one of the
Defendants) *Respondent.*

Raboo Chunder Madhub Ghose for
Appellant.

Baboo Doorga Mohun Doss for Respondent.

A Lower Appellate Court was held to have been wrong in treating as an estoppel the plaintiff's deposition in a former suit when no issue had been raised on the point by the original Court in the present suit.

Birch, J.—THE Subordinate Judge has reversed the Moonsiff's order without going into the case on its merits, because he finds that the plaintiff had in an Act X suit deposed that he had transferred the property now in dispute to his sons by *heba*. On this ground he considers that the plaintiff is debarred from bringing the present action to establish his right to the land. On referring to the plaintiff's deposition in the Act X suit, I find that in the first part of his deposition he then said the land was his, and afterwards said he had transferred it to his sons. No attempt was then made to reconcile the discrepancy in his statements. The Moonsiff who tried the present case held, and I think rightly, that the deposition given by the plaintiff ought not to be considered as a bar to his bringing the present suit. No issue was raised on the point, and it is merely referred to by the Moonsiff at the end of his judgment as an objection which had been raised in the argument before him. In appeal before the Subordinate Judge this objection seems to have been pressed, and without going into the case he allowed the objection to prevail, and dismissed the suit.

I think that the Subordinate Judge was wrong in treating the former deposition as an estoppel, and the case must go back to be tried by him on its merits. Costs to abide the result.

The 31st July 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Ijaradars—Adverse Possession.

Case No. 348 of 1873.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 29th August 1872, reversing a decision of the Moonsiff of that district, dated the 26th February 1872.

Dhoop Singh Roy (Plaintiff) *Appellant,*

versus

Binode Beharee Shaha and others (Defendants) *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Ashootosh Dhur for Respondents.

A putneedar taking an ijara from a lakhirajdar, cannot, by omitting to collect rent, cause adverse possession to grow up on his part against the lakhirajdar.

Jackson, J.—THE plaintiff in this case appears to have been the owner of a piece of lakhiraj land, and to have given his land in ijara to the putneedar. The putneedar who took the ijara, Sreeram Mojoondar, was afterwards sold out, and the defendants are the present holders of the putnee. The ijara having expired, the plaintiff desired to enter into possession of his land, which the defendants refused to give up. The plaintiff having sued for recovery of possession got a decree in the Moonsiff's Court, but the Judge has reversed that decree upon what seems to us an untenable ground. That ground is simply that Sreeram the late putneedar's possession is not made out. The Judge observes:—"It is admitted that he did not cultivate the land himself, or exercise any other right of ownership in regard to the land other than that of an ordinary ijaradar. But there is no evidence to show that rent for the land in dispute or for any part of it was paid to Sreeram as ijaradar by the actual occupier of the soil." So it appears to be the Judge's opinion that Sreeram, as

ijaradar under the plaintiff, by omitting to collect rent, if he did so omit, could cause adverse possession to grow up on the part of Sreeram himself or his successors against the plaintiff,—a position manifestly impossible. It seems to have been proved that Sreeram did take the farm and held as farmer; that defendants are now in the place of Sreeram as putneedar; and that they have no other right than as successors of Sreeram both *qua* putneedar and *qua* ijaradar. That being so, we think the plaintiff is clearly entitled to a judgment, and that the decision of the Lower Appellate Court must be set aside, and that of the Moonsiff restored with costs.

The 31st July 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act VIII of 1865 s. 16—Howladars—Howlah Pottah.

Case No. 419 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Backergunge, dated the 26th September 1872, reversing a decision of the Moonsiff of Ferozepore, dated the 14th August 1871.

Tiluck Chunder Kupalee (one of the Defendants) *Appellant,*

versus

Rajah Suttanund Ghosal (Plaintiff) *Respondent.*

Baboo Kashee Kant Sen for Appellant.

Baboos Hem Chunder Banerjee and Obhoy Churn Bose for Respondent.

In a suit by a purchaser claiming in virtue of Act VIII of 1865 s. 16 and seeking to eject defendants from land which they have been holding in succession from their father as cultivators, and which they allege to have been holding under a howlah pottah, it is open to the defendants to prove that they are howladars, although they fail to prove the howlah pottah which they set up.

Jackson, J.—THE judgment of the Lower Appellate Court in this case cannot be supported. The suit was on the part of a purchaser claiming by virtue of Section 16 Act VIII of 1865, B.C., to eject the

Kupalee defendants from the land which they had been holding. The defendants set up a howlah tenure, and produced the pottah. In the opinion of the Moonsiff the pottah was not proved, but he considered that the defendants were holding as howladars, and dismissed the plaintiff's suit for khas possession.

On appeal, the Subordinate Judge agreed with the Moonsiff in thinking that there was no satisfactory evidence that the howladaree pottah was a genuine document. He then found fault with the Moonsiff for holding that notwithstanding this the defendants had held the disputed property as a howlah. He goes on to say:—"They (defendants) do not represent themselves as khodkhast tenants, nor do they object that they have dwelt on and held possession of the property under the aforesaid right. On the contrary, they plead that they are kursa tenants and hold a tenure intermediate between the landlord and the cultivating tenant, that is, howladaree tenure." Now the defendants may have alleged themselves to have held as howladars, but it was for the Court to find what had been proved in the case. If the finding to which the first Court came is correct, viz., that the defendants had occupied this land by living upon it and cultivating the culturable portions of it, and that they have been holding it in succession to their father, who died so long as forty years ago, they would come under the denomination of resident or cultivating tenants: but more than that, it might well be that the defendants although they failed to prove the pottah they set up, might have proved that they were howladars. The ground on which the Subordinate Judge has reversed the decision of the Moonsiff is fallacious. The case must go back to the Lower Appellate Court in order to find what the real position of the defendants was, for what period they held this land, and upon what footing. The Court will then apply to the case the provisions of Section 16, or such other law as may be applicable to it.

We are reminded that there is more to be done than this. The defendants relied upon a pottah which *ex concessis* was of very great age, and which could not be proved in the ordinary way. It was the business of the Appellate Court to have taken into consideration all the circumstances connected with it, and if it be found that the defendants had occupied this land in the way as found by the Court of first instance, to have considered whether such possession did not

go very far to prove the genuineness of the howladaree pottah. It would not be sufficient to look merely at the appearance of the document or call for actual proof of its execution, which under the circumstances could not be obtained. The whole of these facts must be taken into consideration in deciding the case *de novo*.

The costs will follow the result.

The 31st July 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Proceedings under Act IV of 1840—Act XIV of 1859 s. 1 cl. 7.

Case No. 1918 of 1872.

Special Appeal from a decision passed by the Judge of Patna, dated the 30th July 1872, affirming a decision of the Subordinate Judge of that district, dated the 15th February 1872.

Mosaheb Ali and others (Plaintiffs)
Appellants,

versus

Nund Kishore (Defendant) *Respondent.*

Mr. C. Gregory and Moonshee Mahomed
Yusoof for Appellants.

Baboo Rajendra Nath Bose for Respondent.

Where the result of certain proceedings under Act IV of 1840 was a letter from the Judge, directing the Magistrate to leave certain maliks not in possession of a certain *dearah* in dispute to their civil remedy, and the Magistrate ordered the Judge's letter to be put with the record, *Held* that such order was not an order in the sense of Act XIV of 1859 s. 1 cl. 7.

Phear, J.—It seems pretty clear that both the Courts below have fallen into some error with regard to the final order which is supposed to have been passed, as the result of the institution of proceedings under Act IV of 1840 by the present plaintiff in 1861.

The first order which was made in those proceedings appears to have been dated the 5th June 1862; and by that order the Deputy Magistrate *refused* to interfere in the matter of the plaintiff's application. On

appeal against that refusal to the Judge, the Judge, by an order made on the 2nd August 1862, directed the Magistrate to entertain the matter, and to put that party into possession whose zemindaree was opposite to the *dearah*. After this, in consequence of the rains and other reasons, considerable time elapsed before the Magistrate took action. But when he did go to the ground for this purpose, he saw reasons to think that the Judge's order could not be acted upon, or at any rate he thought it necessary to apply for further instructions. And accordingly he communicated to the Judge that which he found on the ground to be the state of facts with regard to possession. The Judge then wrote back to him saying in substance, "as the Fareednapore maliks do not appear to be in possession by your account, they must be left to their civil remedy." The Magistrate received this in the early part of the year 1863, and in a proceeding, which recited the substance of the Judge's letter, he directed it to be put up with the record. And this direction of the Magistrate to the effect that the Judge's letter be put up with the record is the order made in March 1863, which has been considered by both the Courts below as the final order in the proceedings instituted by the plaintiff under Act IV of 1840, and to be an order binding the plaintiff in regard to the possession of the land for which he now sues. But it is very plainly no order in regard to the possession of the *dearah*: it binds no body, either by directing any one to abstain from attempting to get possession, or by giving the sanction of the Magistrate to any one's retaining possession. Consequently the present plaintiff is in no way bound by that order in respect to possession: he is in neither a better nor a worse position relative to the possession of the *dearah* as a consequence of that order than he was before it was made. In short, the plaintiff is not,—to use the terms of the words of clause 7 Section 1 Act XIV. of 1859,—is not a "party bound by any order respecting the possession of" the *dearah*. Therefore it seems obvious that he is not prevented from bringing this suit by any thing which is enacted in that Section. The Lower Appellate Court has dismissed the plaintiff's suit on the ground that it is barred by this Section. So did the first Court, and there has not yet been a trial of the suit on its merits.

We must, therefore, reverse the decisions of both the Courts, and remand the case to

the Lower Appellate Court in order that the Judge may send back the case to the Court of first instance for trial.

Parties will be allowed to adduce such evidence as they think necessary.

Costs that have already been incurred in all the Courts will abide the event.

The 19th July 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Usury Laws—Interest—Unconscionable Agreement—Jurisdiction—Breach of Contract—Penalty—Act XXVIII of 1855.

Case No. 155 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 27th March 1871.

Omda Khanum and others (Defendants)
Appellants,

versus

Brojendro Coomar Roy Chowdhry (Plaintiff)
Respondent.

The Advocate-General and Baboos Unmoda Pershad Banerjee, Chunder Madhub Ghose, Kalee Mohun Dass, and Romesh Chunder Mitter for Appellants.

Mr. J. T. Woodroffe and Baboos Sreenath Doss, Doorga Mohun Dass, and Mohinee Mohun Roy for Respondent.

Held (by Markby, J., whose opinion prevailed) that since the passing of Act XXVIII of 1855 there is no legal restriction on the rate of interest, and that parties may legally adopt any rate which they may think fit.

Held, by Birch, J. (*per contra*) that the repeal of the usury laws would not prevent Courts constituted as the Courts of this country are from setting aside an unconscionable agreement made with a necessitous man, on the ground of inequality, as being an unreasonable advantage made of his necessitous situation and as being oppressive and unjust.

Held (by Markby, J.) that a party to a contract cannot get rid of it by such suggestions as that it was unconscionable, oppressive, extortionate, made at the last stage of the case after all the evidence has been closed, where no such allegations were made in the written statements, nor any such question raised in the Courts below nor in the grounds of appeal.

Held (by Markby, J.) that it is not the high rate of interest which constitutes a penalty; but what constitutes a penalty is a stipulation for a higher rate if the contract is broken.

Birch, J.—I MAY first mention that we were asked to delay giving judgment in this case until the three regular appeals which

we have called up for hearing in this Court were disposed of. We do not, however, feel justified in delaying our judgment.

The plaintiff sues to recover 20,000 rupees money lent, and for which the principal defendants granted a receipt on the 25th Pous 1276, and claims interest thereon under the terms of an ekrar given by Asadoodeen Hyder, Khajah Abdool Kurreeem for self and as guardian of Khajah Abdool Gunny, Syud Mahmood for self and as attorney for Fatima Banoo, and by Azeezoonnissa Khanum. The ekrar is filed by the plaintiff and bears date the 25th Choitro 1275. The receipt is also filed and bears date 25th Pous 1276, ten months later than the ekrar. It purports to be signed by Khajah Abdool Kurreeem and by Syud Mahmood for self and as mookhtear of the remaining shareholders. In his written statement Mahmood denies having received the money; alleges that the ekrar filed by the plaintiff is forged; that no ekrar was executed on the 25th Choitro, but that one was executed on the 2nd Choitro 1275, according to the terms of which the plaintiff took over the management of the property in the possession of himself and co-sharers, and realized a very large sum of money. He also states in his written statement that his signature to the receipt was obtained by fraud and misrepresentation and by promises of rendering an account, but he subsequently stated in a petition to the Court that the receipt was obtained by threats of involving him in some criminal case if he did not sign it. The written statements of the other defendants, excepting Abdool, are to the effect that the ekrar filed is not the ekrar executed, and they generally support the statement of Syud Mahmood; and throughout this appeal all the appellants have appeared by the same Counsel and raised the same contentions. In the Court below also, all the defendants, except Abdool Kurreeem, appear to have joined in the same defence. Abdool Kurreeem, defendant No. 6, admits the execution of the receipt and the execution of the ekrar, and the fact of the money having been applied for the benefit of the family.

All the defendants, with the exception of Abdool Kurreeem, deny the genuineness of the ekrar filed, and assert that an ekrar containing very different conditions was executed on the 20th Choitro.

There were other suits between the same parties heard at the same time by the Subordinate Judge, and it was agreed that,

in this appeal, the parties should be at liberty to refer to any of the evidence given in any of the suits. The same course appears to have been taken to some extent in the Lower Court.

The disputes regarding the possession of Pergunnah Sreerampore, of which the defendants in this suit who executed the ekrar claim a 7 annas 16 gundahs 2 cowries 2 krants share, commenced upon the death of Gholam Pir, who died in Bhadro 1275. His son, Mahomed Mirza, appears to have retained possession of the 16 annas of the pergunnah. In March 1869, disputes regarding possession arose between Mahomed Mirza and the other members of the family. It is clear from the evidence on the record that the defendants were in difficulties about their shares, and that there was likelihood of the family estates being sold up for arrears of revenue. The plaintiff was a man of wealth and experience in zemindaree matters, and to him the defendants resorted in their difficulty. As might be expected, considering the risk incurred, the conditions of assistance were not easy, and the plaintiff made the most of his opportunities and his debtor's exigencies. Upon both sides it was a speculative transaction. The defendants were out of funds and out of possession; they had not experience themselves, nor had they capable agents available to conduct the proceedings necessary to bring their adversary to terms. Plaintiff had the funds and agents of shrewdness, and perhaps not over scrupulous, available. He advanced money as required, and selected the defendants' servants for them—men who were equal to the work they had to do. Thakoor-doss Bhutacharjee was, on the recommendation of the plaintiff's headman, Mohesh Chunder Biswas, appointed as the defendants' servant in Bysack 1276. Under him was Prosunno Singh, appointed in Chyet 1275. Lukhee Chunder Roy likewise appointed on Mohesh's recommendation in Jeyt 1276. Dinonath, a vakeel of the Moonsiff's Court, appointed before Lukhee Chunder. Jadub Biswas appointed in Bysack 1276. Rujub Ali, in Chyet 1275. The loans to the defendants commenced in Choitro 1275, and the disputes in the pergunnah between Mahomed Mirza and the defendants followed immediately after, and became so serious that a Police force had to be stationed on the estate; and in July 1869 securities were taken from the rival parties to prevent a breach of the peace. When, therefore, the ekrar was executed, the main defendants had not secured possession of their share; they

were determined to fight for it, but they needed money and agents of ability which the plaintiff undertook to supply. After ten months, however, it was found that the speculation was a losing one, and had resulted in litigation and criminal proceedings necessitating an expenditure considerably greater than the parties had anticipated, and ten months after the execution of the *ekrar* the plaintiff refused to go on advancing, and insisted upon the security of a receipt for what he had already advanced to the defendants' manager Thakoordoss Bhutacharjee and themselves. That he should take this precaution at that time was not to be wondered at. Mahmood was playing fast and loose. His letter to Prosunno shows how anxious he was to get his adversary Mahomed Mirza out of the way and involved in a criminal case. In that intention he was foiled, and Mahomed Mirza's possession could not be disturbed. Mahmood had by this time got out of the plaintiff as much as he was likely to get, and he then commenced overtures to Mahomed Mirza to take the *ijarah* of the 7 annas 16 gundahs 2 cowries 2 krants as his father had done before him. In *Srabun* or *Assar* 1276, Mahomed Mirza got the *ijarah* apparently through the influence of Khajah Abdool Gunny, and in *Jeyt* 1277 we find Mohesh Chunder Biswas telling Pearee Lall to put no difficulty in the way of Mahomed Mirza's manager, but to support him. All that Mohesh then thought of was getting back his master's money, and it is in evidence that he tried to get Mahomed Mirza to take over the defendants' liabilities with the farm of their share.

In *Magh* 1276 we find that the plaintiff was aware of the compromise effected with Mahomed Mirza; that he approved of it, and was ready to agree to any arrangement that might be for the advantage of Mahmood and the family. I can place no reliance upon any statement of Mahmood's, and I have not the least doubt that the letters Nos. 60, 61, and 63 were written by him, although he will not admit that they were. When he wrote No. 63, he was perfectly well aware that the *ijarah* had already been promised to Mahomed Mirza, that the plaintiff was aware of it and had spoken of it in his letter to him of 22nd *Magh* 1276 (3rd February 1870). This letter, No. 63, was apparently written with a view to its being available as evidence that Mahmood had threatened to bring a suit for an account against the plaintiff. The plaintiff states that he sent two letters on 23rd and 30th

Chyet 1276, asking for the *ijarah*. These letters are not forthcoming, and it is to my mind quite clear that the plaintiff did not want the *ijarah* at that time, but asked for it as a precautionary measure in case a law suit should ensue. The letter written by Mohesh on 15th *Assin* 1276 (30th September 1869) speaks of a compromise being under consideration. On the 19th, he speaks of its having fallen through, and says that the *ijarah* of "our share," meaning the defendants, "shall never be given to him" (Mahomed Mirza). On the 28th he writes in some alarm, expresses satisfaction that the compromise had not come off, says that there would be a dead loss in taking the *ijarah* (of Mahomed Mirza's share), and that "no *ijarah* should be given to him by us," meaning the defendants. In *Kartick*, Mohesh complains that the tenants wont pay rent, and that the expenses of *Sreerampore* are so heavy that he does not know how to support them. In *Magh* (the 2nd) some misfortune is foreshadowed, which he does not care to write about. This I interpret to be the compromise of which his master, the plaintiff, speaks in his letter from Calcutta of the 22nd *Magh*, and the purport of which he says he is about to communicate to Mohesh. That compromise could only have been the termination of the fight for possession between the defendants and Mahomed Mirza, by the former giving their shares in firm to the latter, thus renewing the arrangement that had existed in Gholam Pir's lifetime. The master, Brojendro, approved the compromise, as he then wished the family to be saved, Khajah Abdool Gunny having brought his powerful influence to bear to stop the family dissensions. The servant Mohesh disapproved of it, as he wished to secure possession of the whole estate under an *ijarah* and ultimate transfer of the proprietary right to his master. In *Jeyt* 1277, Mohesh commences abusing the Syuds, defendants, and lauds Mahomed Mirza as a man whose good is to be sought, although in the year before he had been doing his best to ruin him. The disputes which he (Mohesh) had fostered had resulted in an amicable settlement, under which Mahomed Mirza's possession of the whole property had been confirmed, he having obtained the *ijarah* of their shares from his co-sharers, and it then became Mohesh's interest to support him as his best chance of getting back the money advanced by his master to the defendants.

That the money was advanced, and the

receipt given by Mahmood after going through the accounts is, I think, established beyond doubt. He was the active member of the family who transacted all business. Abdool Kureem took a less active part and was not so much trusted. Asadoodeen was too old and out of health to do much. Azeezoonnissa was Mahmood's wife, and Fatima Banoo was the wife of his younger brother Mahmood Rugbi. Mahmood held a general power-of-attorney from his father Asadoodeen, giving him full authority to sign his name to any bond, or promissory note, or ekrar. He also held a power from Fatima Banoo to execute the ekrar on her behalf, or to modify its conditions. These powers have been duly proved. He held no power from his wife.

The Subordinate Judge has held that the power granted by Fatima Banoo did not authorize Mahmood to sign her name to the receipt. Had I been trying this case as an original suit, I think I should have arrived at a different conclusion. As regards Azeezoonnissa, I think that, looking to the circumstances of the case and her evident state of seclusion and dependence on her husband, and to the fact that she, like other female members of the family, left all her business in his hands, it may fairly be inferred that he had authority from her to act on her behalf. It is a matter of surprise that no question was put to Mahmood upon this point while he was in the witness-box. And apart from the question of Mahmood's being duly authorized to sign, and looking merely to the position of the members of the family, and Mahmood's being evidently the managing member of the family property, I should be inclined to favor the presumption, in the absence of evidence to rebut it, that what was done was done for the benefit of the family property, and that the sharers are bound by Mahmood's act. As to the contention that Mahmood was cajoled or frightened into signing the receipt, I consider that there is not any reliable evidence to support it, and that the Subordinate Judge has effectually disposed of this contention.

Not a particle of evidence has been adduced to show that any such ekrar as the defendants allege was signed on the 2nd Choitro ever had existence.

It has been urged before us that in the body of the receipt of the 25th Pous, the date of the ekrar has been tampered with; that a "5" has been inserted between the figure 2 and the word "Choitro,"—and the date the 2nd changed into the 25th. I have

carefully examined the original, and I find no sign of any such alteration. The writing of the receipt is cramped throughout, and the figure 5 impinges closely upon the initial letter of Choitro, but it has been so written *currente calamo*, and there is no sign of interpolation. The word "Dacca" has been added in a different ink, but the addition is according to native custom attested on both sides by the executant.

No doubt the date given for the ekrar in the two bonds subsequently executed is the 2nd, and not the 25th of Choitro, but I have no doubt that this is simply a slip of the pen of which the defendants have taken advantage in this case to enable them to contest the genuineness of the ekrar produced by the plaintiff. The ekrar was presented for registration on 25th June 1869 by Khaja Abdool Kureem, and upon execution being admitted by Khajah Abdool Kureem for self and as guardian of his minor son Abdool Gunny, by Syud Mahmood for self and for his father Asadoodeen under a power-of-attorney No. 181 of 1869, the deed was registered on the 6th July 1869. Before the Lower Courts the defendants, with the exception of Abdool Kureem, who admitted execution of the deed filed, urged that the ekrarnamah before the Court had not been executed by them. Syud Mahmood in his written statement vaguely characterizes the ekrarnamah filed as invalid, incomplete for stamp, date, and other reasons. In his examination on oath he denies that he executed this ekrarnamah. He does not attempt to say what has become of the ekrar, which he says he did sign on the 2nd Choitro. The conditions of the ekrar, as given by him in his written statement, vary considerably from those of the ekrar filed. And had such a document as Mahmood speaks of ever been really executed, some trace of its existence must have been forthcoming. Dinonath Roy, the third executant, who represented Azeezoonnissa by a power-of-attorney duly proved, is dead. Of the two male survivors, one, Abdool Kureem, admits that this is the true ekrar which he, Dinonath, and Mahmood signed. Syud Mahmood denies it, but he admits that he registered an ekrar, and the ekrar filed is the only one that was registered. The view that the ekrar filed is the genuine one is confirmed by the recital of its condition in the mookhtearnamah executed by Fatima Banoo in Calcutta on the 6th Choitro 1275. That mookhtearnamah was evidently drawn up by a skilled native draftsman who had the draft of the proposed ekrar before him. As

the case has been argued before us, the contention that there was another ekrarnamah has been allowed to drop. The ekrar on the record sets forth that the plaintiff had agreed to allow the defendants to draw upon him to the extent of Rs. 20,000 within three years; he was to repay himself by having the ijarah of the defendants' share for ten years, commencing from the 1st Bysack 1277. A 4-anna share of the profits, after deducting Government revenue and expenses of collection, was to go in payment of interest upon the money lent; half of the remaining three-fourths was to go towards payment of the principal, and the other half to the defendants according to their fractional shares. If at the end of the term any balance remained due to the plaintiff, the defendants were to pay it with interest at 18 per cent. Failing that, the plaintiff was to retain possession on the same conditions until the amount borrowed had been liquidated. The reason assigned for deferring the grant of the farm for twelve months is that the defendants did not know what the income of their share was; they wanted a year to ascertain it. If they failed to grant the lease, the defendants agreed to repay the amount borrowed with interest at 6-4 per cent. per mensem, or 75 per cent. per annum. If the plaintiff refused the ijarah, he was to receive only the principal without interest within six months from date of refusal.

The 2,000 rupees were drawn within nine months. Other loans had previously been made to the defendants individually on bonds upon which other suits have been brought, which will have to be separately considered.

The plaintiff has produced his khatta-books, and they show when the sums were paid. It has been said here that the plaintiff must show how those sums were expended. Now, if the plaintiff had been in possession, it would have been for him to show what he collected and where the money went. But I think it is clear that he was not in possession, and that the defendants through their servants collected for a very short time a small sum by force and stratagem from some of the tenants; that they were at once and successfully opposed; and that what little they did collect went at once in law suits, mofussil expenses, and disputes in the Criminal Courts. Under such circumstances, what account could the plaintiff furnish other than that he has filed? The rapid expenditure of the sum bargained for is easily accounted for when it is observed how recklessly the defendants went in for forcible ouster and proceedings in all the Courts connected therewith. The

letter No. 60, which I believe to be genuine, says that "no expense must be heeded; at the sacrifice of life and wealth," the object was to be attained. Thakoordoss was told that there would be no difficulty in getting any amount of money when necessary.

One point, of which much has been made in the course of the argument, is that Thakoordoss, Kalee Mohun Sen, Ram Narain Biswas, Prosunno Singh, Jadub Chunder Biswas have since become the plaintiff's servants. It has been said that this fact shows that they were all along really in the service of the plaintiff; that the plaintiff was in receipt of the collection through these servants; and that the defendants were entirely in the hands of these persons. As already remarked, they were no doubt selected by the plaintiff, and were also no doubt originally his own servants; and it appears to me natural enough that they having been chosen by plaintiff as likely instruments to foil the defendants' adversary, Mahomed Mirza, should, when they found their efforts frustrated, and the defendants turning against the plaintiff, re-enter the plaintiff's service. They were all Mohesh's nominees, and Mohesh is evidently a good patron.

But it is quite clear that Thakoordoss, through whom the money was advanced, was in the defendants' employ. In a deposition given by Asseeroodeen in the year 1870, and which is filed by the defendants, it is sworn that Thakoordoss is "the am-mookhtear of all of us," and he was called upon by the defendants to produce his mookhtearnamah; and the letter No. 60 shows that the defendants considered Thakoordoss as acting under their orders.

The ekrar and the receipt being genuine documents, there can be no doubt that the Rs. 20,000 principal now claimed is due to the plaintiff. Had it not been for this receipt it might possibly have been urged that the advances have been made much more rapidly than was contemplated by the ekrar; something more was necessary than the mere evidence that the money was paid over to Thakoordoss Bhutacharjee; though being the defendants' servant, I do not quite see how that could have been necessary. But the receipt, given as it was upon a settlement of accounts, precludes all question upon this point. It establishes conclusively that the money was properly advanced under the ekrar as against all persons who executed that receipt, or who were properly represented when it was executed.

HAVING arrived at the conclusion that the ekrar is genuine, I have now to consider which of its provisions ought, under the circumstances which have now arisen, to be enforced. Probably neither party contemplated the present state of things. I cannot find that the plaintiff ever actually refused the ijarah in so many words, but I treat his assent to its being granted to Mahomed Mirza as tantamount to a refusal and carrying the same consequences. I treat Mahmood's offer of it as made merely to get up a piece of evidence. The plaintiff assented to the "arrangement proposed," and what that arrangement must have been I have already pointed out. The defendants have failed to execute, or rather have been prevented from giving, an ijarah lease in favor of the plaintiff. They agreed upon such failure to repay the amount borrowed with interest at $6\frac{1}{2}$ per cent. per mensem (75 per cent. per annum). The Lower Court has given a decree for interest at that rate, and the question now to be determined is whether that portion of the decree can be supported.

It was contended on behalf of the appellant that we ought to be guided by the Contract Law, IX of 1872, Sections 73, 74, 75, in deciding this case. Now the contract we are dealing with was executed on the 6th April 1869. The Indian Contract Law became law on the 1st September 1872. I consider that that law can have no retrospective effect.

The principle of the Civil Law (*omnia constituta non preteritis calumniam faciunt, sed futuris regulam impomunt*) as to new laws not having retrospective force has been transferred into the chief modern Codes. The Code Civil Act II runs thus:—"La loi ne dispose que pour l'avenir elle n'a point d'effet retroactif." The Prussian Code enacts, "new laws cannot be applied to acts and events that have previously occurred." The Austrian Code provides,—"Laws have no retrospective effect, they have therefore no influence on previous acts or acquired rights." And the English cases of *Hughes vs. Lumley*, 4 Ell. & Bl., 358, and the *Mayor of Berwick vs. Oswald*, 3 Ell. & Bl., 678, seem to me to support the view that an Act regulates the future, and not the past, unless it appear from the Act itself that the intention of the Legislature was otherwise.

It was also pressed upon us that the contract was invalid under the Hindoo Law, and we were referred to a case reported in 3 B. L. R., O. C., 130, and to cases reported in the 3rd and 4th Bombay Reports. It is unnecessary

to consider the Bengal case upon which so much stress has been laid, inasmuch as Courts not established by Royal Charter have only to follow Hindoo and Mahomedan law in cases regarding succession, inheritance, marriage, caste, and all religious usages and institutions (Regulation IV of 1793, Section 15; VIII of 1795, Section 3) and the decision quoted was passed on the Original Side of the High Court, which in matters of contract was by Statute required to determine questions arising between Mahomedans and Gentoos by their laws and usages. That decision can be no guide to us in dealing with a case coming from a Court not established by Royal Charter. It seems to me that, Act XXVIII of 1855 notwithstanding, it must occasionally be the duty of a Civil Court in India to decline to give effect to agreements under which an undue advantage is exacted from persons under grievous necessity, and under circumstances from which it may be inferred that they did not fully comprehend the extent of the obligations they were incurring. Landholders in the interior of the country are under our strict revenue system often at the mercy of grasping money lenders whose ultimate object is to obtain their estates, and the landholder is too often deprived of all legal advice, and not only ignorant of law, but of all business matters.

Inadequacy of consideration, urgent need of money, and ignorance are ingredients which must have some weight upon a Court of Equity in considering whether it will enforce an agreement; and all these ingredients are to be found in this case. For an advance of Rs. 20,000, the defendants were to assign to the plaintiff for ten years ten-sixteenth of the profits of a property yielding an income of about Rs. 28,000 a year on their share. Only the remaining six-sixteenths was to be allowed to the defendants for maintenance. Of the inadequacy and unfairness of this arrangement there can be no doubt, and the transaction marks overreaching on one side and extreme ignorance on the other.

I treat the case as a mere question of interpretation of a contract of a very peculiar nature, in which it is useless to look for authority to any other system of law, but in which we must be guided by the provisions of Section 21, Regulation III of 1793 (now incorporated in Act VI of 1871), to which we in the exercise of our appellate jurisdiction are bound to conform.

There are three stipulations in the ekrar. One, which we need not now consider, is that no interest shall be paid if the debt is

liquidated within six months of the plaintiff's refusal to take the *ijarah*; the second is the interest for delay in payment calculated at 18 per cent. upon any balance remaining due after the term of the *ijarah* shall have expired; the third is the stipulation for 75 per cent. per annum, if the defendants fail to give the plaintiff the lease.

What the plaintiff contemplated was permanent possession of the defendants' share of the estate: first temporary possession under an *ijarah*, the conditions of which are very hard upon the defendants, and then permanent under a putnee. About the middle of 1276, he began to realize that the defendants could not get their shares into their own hands, a necessary preliminary to their granting an *ijarah*. And in Magh 1276, the plaintiff, by his letter, approving of the compromise between the defendants and Mahomed Mirza, whom he had previously been assisting them to oppose, virtually put an end to the penultimate condition in the *ekrar*, and waived his claim to the *ijarah* and to the exorbitant interest which was to be the consequence of the defendants' failure to grant the *ijarah*.

The debtors were, in the latter part of 1276, it seems to me, in the condition of persons who being parties to contract had by the pressure brought upon them by an adverse co-sharer been incapacitated from fulfilling their contract to grant the lease. This alone would be a ground for rescinding this portion of the contract. And when in addition to this I find the plaintiff assenting to an arrangement which of necessity dissolved the contract to grant the lease, I cannot consider it in accordance with equity or good conscience to say that, though he acquiesced in an arrangement which dissolved the first clause of the sentence regarding the lease, he could retain and sue upon the latter clause of the sentence which made 75 per cent. interest the penalty for not granting the lease. The language in which the agreement is drawn up has no equivalent for "liquidated damages" or "penalty," and the contracting parties or their advisers may be fairly assumed to know nothing of these technical terms. They use the word "soodh," or interest. I think it of importance in interpreting this deed to bear in mind that it was drawn up in the interior where legal advice in the proper sense of the words is not to be obtained; and I cannot divest my mind of the impression founded on some experience of the stolid ignorance of or indifference to business-matters amongst the

uneducated landholders, that the defendants did not really understand to what extent they were placing themselves and their property in the hands of the plaintiff. And if I did not treat as I do the plaintiff's letter of the 22nd Magh as an assent to the dissolution of that part of the contract which relates to the *ijarah*, and the interest consequent on a refusal to grant it, I should still hold that the repeal of the usury laws would not prevent Courts constituted as our Courts in this country are from setting aside an unconscionable agreement made with a necessitous man, on the ground of inequality, as being an unreasonable advantage made of his necessitous situation and as being oppressive and unjust (Colebrooke on Obligations, page 57). It has been said by the Lords of the Privy Council that the Courts of this country exercise a wider jurisdiction than the Courts of Equity in England, and I find the following remark as to the powers of the Court of Chancery in the judgment in the case of *Barrett vs. Hartly*. "But it is an observation of some importance now that the usury laws are repealed, that one effect of such repeal was to bring into operation to a greater extent than before another branch of the jurisdiction of this Court which existed long before them. I mean that principle of the Court which prevented any oppressive bargain or any advantage exacted from a man under grievous necessity and want of money from prevailing against him. Whoever has attended to the subject must have seen that the moment the usury laws were repealed, and the lender of money became entitled to exact anything he pleased in the name of interest, from that moment that jurisdiction of the Court which prevailed independently of the usury laws, was likely to be called into active operation."—2 L. R., Equity, page 795. The Bombay Court has held that Act XXVIII of 1855 does not prevent a Civil Court in India from examining into the character of agreements, and from declining to enforce such agreements unless they are shown to be fair and reasonable,—Volume IV, 202, and Volume III, page 12; and in the Circular of the Punjab Chief Court, recently circulated by this Court to all Judicial Officers by Circular No. 8, 30th April 1873, paragraph 14, it is said—"The Courts may consider whether or not the contract was a prudent one, with a view to determining whether extreme imprudence from which, along with other circumstances, the existence of

"and the influence might be inferred, has or has not been manifested." And in paragraph 10, the language conveys the spirit of V. C. Stuart's remarks above quoted. It runs thus:—"The repeal of the usury laws by Act XXVIII of 1855 has left untouched the doctrines of equity both as to the protection of debtors who, for any real reason, are not fully competent to protect themselves, and as to the power of Courts to relieve against what are called unconscionable bargains with such persons." And in paragraph 11, "no strict rule defines or can define where comparative incapacity ceases, and where extreme ignorance and helplessness call for the protection of the equitable rules prescribed by law."

The defendants never got possession of their share, and never were in the position contemplated in the ekrar; and under the circumstances I think that a Court of Equity should not compel the defendants to pay for the use of Rs. 20,000 for fourteen months and nineteen days the sum of Rs. 17,855-8-8 as interest, which is what the plaintiff's claim amounts to up to date of decree, if interest is calculated at $6\frac{1}{2}$ per cent. per mensem, or 75 per cent. per annum, and for which the Subordinate Judge has given him a decree. The compensation that such a Court will give for breach of contract under such circumstances, and the test of the relief it will afford is, I apprehend, the damage really incurred by the money-lender. Now this ekrar and the other bonds show that 18 per cent. was the interest the plaintiff was content to receive in the usual course of his business in making advances on *personal* security. And in my opinion, if he receives the full amount of Rs. 20,000 with interest thereon at 1-8 per cent. per mensem from the date of the loan to the date of the decree, he will receive all that he can justly claim. From that date up to realization, interest to run upon the amount decreed at 6 per cent.

It is with some diffidence that I dissent from my learned colleague, but I cannot hold that Act XXVIII of 1855 debars me from applying to the case under consideration the rule of equity and good conscience, or that I am compelled by that enactment to support or carry into execution so oppressive and inequitable an instrument as this ekrar.

Markby, J.—Upon the general facts of the case I agree with the conclusions come to by Mr. Justice Birch; and as these are substantially the same conclusions as were arrived at by the Subordinate Judge, in whose opinion I place great confidence, I do

not consider it necessary to state my reasons separately. I have no doubt whatever that the plaintiff's case is substantially a true one; that the money was advanced, and the receipt given after going through the accounts, which receipt was, I think, under the circumstances, a sufficient acknowledgment as against all the members of the family that the money had been advanced properly, and that they were liable for it. I have no doubt also that the document before us is the genuine ekrar. I do not think the plaintiff was ever in possession of any portion of the income of the estate, and I consider it established that Thakoordoss Bhuttacharjee was the defendants' servant and acted under their orders. As to the exact position of the parties at the commencement of the year 1870 I do not take quite the same view as my colleague Mr. Justice Birch, and upon this I shall observe presently.

In order to ascertain the rights of the parties in this case upon the facts found, it is necessary first to consider the construction of the ekrar. It seems to me that that document contemplates three contingencies; (1) that the plaintiff should get into possession of the property under the ijarah, in which case provision is made that the advances should be repaid with interest at not less than 1-8 per cent. per mensem; (2) that the parties who agreed to do so should fail to execute the ijarah or lease on the 13th April 1870, or before, according to their engagement, in which case the advances were to be repaid with interest at the rate of one anna in the rupee, or Rs. 6-4 per cent. per mensem; (3) that the plaintiff should refuse to accept the ijarah, in which case the advances were to be repaid without interest within six months of the date of the refusal. Now the events which have happened, to which we have to apply these alternative stipulations, are these. The defendants or those whom they represent as appears by the evidence, had, after the ekrar was executed, negotiated with another person, Mahomed Mirza, with whom they were contending for the possession of this property, for the grant to him of an ijarah of their share. This was known to the plaintiff's agent, Mohesh Chunder Biswas, and was not expressly disapproved by him, and he at one time appears to have favored this project; but there is no evidence that it was expressly consented to by the plaintiff prior to the letter of the 3rd February 1870, though it may be fairly presumed that Mohesh Chunder Biswas was acting with the plaintiff's

sanction. Now it appears to be contended (for on this, as on many other points, the defendants' case was not put at all clearly) that the plaintiff, by acquiescing in this grant of the *ijarah* to another, has waived his rights under the second alternative. As to the assertion that the plaintiff refused to take the *ijarah* which the defendants were ready to grant, I do not think that there is a shadow of foundation for it. It was a mere pretence on the part of Syud Mahmood to write the letter of the 11th April 1870 offering the *ijarah*, and I agree with the Subordinate Judge, and with Mr. Justice Birch, that this offer was not *bonâ fide* made. But even if it had been so, still, as the Subordinate Judge points out, it contains conditions with which the plaintiff was not bound to comply.

Nor do I think the plaintiff has waived his right to insist upon the second alternative of the *ekrar*. Although the negotiations with Mahomed Mirza were not commenced with the sanction of the plaintiff, and not always approved by his agent Mohesh, still, if the conduct of the defendants had been straightforward and fair towards the plaintiff, and if the matter had rested where it did in February 1870, it might, I think, in that case have been contended with some force that the plaintiff ought to have intimated, when he wrote the letter of the 3rd February 1870, that he intended to rely on his right to the higher rate of interest, if the *ijarah* were granted to Mahomed Mirza. I think it quite possible that the plaintiff did not intend at that time to press his claim to the *ijarah*, and that he was willing then to come to a fair settlement. But between the 3rd February 1870 and the 4th April 1870, it is quite clear that something had occurred which satisfied the plaintiff that he could not rely upon the defendants. This is alluded to in the letter of Mohesh Chunder Biswas of the 3rd June, and no doubt led to the plaintiff's withdrawing his assent to the proposed arrangement and giving notice to the defendants that he claimed the *ijarah* by the several letters of the 4th and 11th of April. These letters were no doubt written to protect the plaintiff's interests, but I see no reason to suppose that they were otherwise than honestly written. The *ijarah* was the plaintiff's only security, and though he might not be anxious to press his claim for it, he would naturally be anxious that it should not go out of his hands unless his debt was in some way provided for. This

claim on the part of the plaintiff the defendants met by writing the letter of the 11th April. This letter is very peculiarly worded, and I feel it extremely difficult to put any certain construction upon it. It states that the plaintiff had had entire charge and control of the property, which has been found to be false. It states that the plaintiff was under an obligation to render accounts when the accounts had already been settled. It states that the plaintiff had expressed his unwillingness to take the *ijarah* when the fact was that the plaintiff had never done so, but had only declared his willingness to assent to any arrangement that might be to the defendants' advantage. It does not inform the plaintiff whether or no the defendants had broken off at that time their negotiations with Mahomed Mirza; and in fact I do not believe that they had done so; and it states that the defendants were ready under certain conditions to grant the *ijarah* which I do not think they ever intended to do. But whatever difficulty there may be in putting a construction upon such a document, this at least is clear, that the letter nowhere alludes to any waiver of the rights of the parties under the *ekrar*. It is throughout an assertion by the defendants of their intention to act strictly up to the *ekrar*, and it calls upon the plaintiff to do the same. The defendants nevertheless carried on their negotiations with Mahomed Mirza, and granted him the *ijarah* a month or six weeks afterwards. There was undoubtedly great duplicity at this stage of the proceedings in the conduct of the defendants; and it is difficult to see exactly what their intentions were, though I am inclined to think they were influenced by a desire to get rid of the clause in the *ekrar* as to interest. But however this may be, I do not see how, after having written the letter of the 11th April, the defendants can now say that there had been a previous waiver by the plaintiff of his rights under the *ekrar*. Under these circumstances, it seems to me that the plaintiff is fully entitled to say that the defendants have failed to grant the *ijarah*, and that the clause entitling him to the higher rate of interest applies.

Supposing that clause to apply, the defendants further contend (1) that a stipulation for interest at 6-4 per mensem is not lawful; (2) that under Act IX of 1872, Section 74, the plaintiff is entitled only to a reasonable compensation for any loss he may have incurred; (3) that the stipulation for higher interest is

by way of penalty only, and not liquidated damages; (4) that the agreement was extortionate and oppressive, and that the defendants ought to be relieved therefrom.

As to the first of these contentions, as far as I am aware, it has been the uniform practice of the Court, ever since Act XXVIII of 1855 was passed, to treat all restrictions on the rate of interest as removed; and that this is so I should also infer from a circular addressed by four Judges of this Court to the Mofussil Courts on the 30th April last, in which, whilst the duties of those Courts in relation to contracts at high rates of interest is elaborately discussed, there is no mention of any legal restriction. If we look into the history of the matter, it is evident that whatever legal restrictions there may have been at one time amongst either Hindoos or Mahomedans, they had ceased to exist before we began to legislate at all upon the subject. It is recited in the Regulation of the 21st August 1772, Section 8, that "the rates of interest hitherto authorized by custom have amounted to the most exorbitant usury." And Mr. Harington considers that "the Hindoo Legislators have expressly sanctioned, and the Mussulman Governments of India appear to have tolerated directly or indirectly the customary interest of the country."—*Har. Anal.*, Volume I, pt. 1, page 182. And the explanation of the prohibition of Menu in Vol. I, pages 69, 70, and 74 of Jagannatha's Digest, fully bear out this opinion as regards the Hindoo law. I know indeed of only one expression of opinion in this Court, that these restrictions still exist, and though no doubt that opinion is entitled to the very greatest respect, it has not been concurred in by any other Judge of this Court, and has been expressly dissented from by Mr. Justice Phear. I believe I shall be adopting the law as acted upon by this Court for a great number of years by holding that there is not now any legal restriction on the rate of interest, and that parties may legally adopt any rate which they may think fit.

As to the second point, I do not think we need concern ourselves with the question whether Act VIII of 1872 applies to this case, because the provision referred to only applies where "a sum is named in the contract as payable in case of a breach." Now I do not think that the stipulation which we have to consider is of that nature. This stipulation, in my opinion, does not provide for a breach of the *ekrar*, and for money payable in case of that breach; but

for an alternative event, which, however brought about, would not be a breach of contract, but which would put the parties in a wholly different position; and this is what they had to provide for. If the defendants did not give the *ijarah*, then the plaintiff would have no security, and the transaction was to be treated as an ordinary loan repayable at a higher rate of interest.

Still less can I look upon this as a penalty. I quite agree with what is said in the case reported in XIX Weekly Reporter, which has been referred to, that we must see what the real intention of the parties was in entering into the contract. That is a universal rule in all questions which arise between the parties to a contract. But *primâ facie* the word "interest" imports not a penalty for breach of contract, but a return for the use of money and a compensation to the borrower for his risk in lending the money; and as was said by Lord Romilly in a case reported in 2 Law Reports, page 224, it is not the high rate of interest which constitutes a penalty:—what constitutes a penalty is raising the rate of interest after a breach. If a man agrees to take a certain rate of interest for his money, but stipulates for a higher rate if the contract is broken by not paying the interest punctually, I can well understand that the higher rate of interest is a penalty, and will be reduced in all cases in which a penalty may be reduced. But I do not think this view can be taken of this contract; because, as I have said upon the construction which I put upon this *ekrar*, this was an alternative stipulation which contemplates that the lender would have no security, and therefore run a much greater risk; and the stipulation is not for a higher rate of interest in case of a breach, but in a certain event for a loan with interest to run at a certain rate.

The last ground was taken at so late a stage in the proceedings, and when taken, was so indefinitely stated, that I have very great doubt indeed whether we ought to enter upon it at all. It was only said in argument in the appeal that the bargain was unconscionable, oppressive, extortionate, and so forth. But no such allegation was made in the written statements; nor was any such question raised in the Court below nor in the grounds of appeal; and I do not think a party to a contract can get rid of it merely by such suggestions as these made at this stage of the case after all the evidence has been closed. I think that if a person desires to contend that a contract which he has signed

does not bind him, he must state the reason why. As Mr. Woodroffe very strongly insisted, had such an allegation been made at the proper time, it might have been met by positive evidence that the defendants were fully aware of what they were doing, and that their consent was a perfectly free and intelligent consent to the terms of this arrangement. I think, to use the expression of the circular above referred to, the person denying the contract must show circumstances from which it may be inferred that he has not been in reality a free agent in making the contract set up against him. I fully concur with the earlier observations in that circular that it is not the duty of the Court "to assist persons in evading the consequences of engagements voluntarily and intelligently contracted." It was clearly, therefore, the duty of the defendants in this case to state and prove the circumstances connected with the entering into of this ekrar which affected their free agency; and I neither find in the printed book, nor have heard in the argument, any allusion to them beyond the vague statement of intimidation which is wholly unsupported by evidence, and which I wholly disbelieve. In fact, up to this very moment not one single member of the defendant's family has ventured to assert in any definite manner that he did not understand the nature of the arrangement, and that he did not think, when it was entered into, that it would be an advantageous one for himself. We are, in fact, asked simply to look at the contract and say whether any reasonable man could assent to it. This is a question which, in most cases, I should feel scarcely in a position to attempt to answer. The terms were no doubt severe, but the risk was great; and it is quite possible that it may not turn out after all to be a very profitable transaction. If I felt at liberty to consider this question, I might perhaps be disposed to think that there is some ground for presuming that the terms were the best which the defendants were likely to get. One of the parties to the ekrar, Fatima Begum, when she authorized the execution of the ekrar, was living in her father's house; and there cannot be a doubt that holding the important judicial office he does, he is thoroughly capable of estimating the prudence of such an arrangement. I think it may fairly be inferred from Moulvee Abdool Luteef's evidence, and the terms of the mookhtearnamah executed by Fatima Begum in his house, which set out in full the terms of the ekrar, that he was acquainted with the nature of the arrange-

ment, and that he would not have omitted to oppose it, or at least to characterize it as unfair to his daughter and the other defendants, had he so considered it. At any rate, this shows that it must not be presumed too readily that the arrangement was oppressive; and had the defendants challenged the ekrar on this ground, this witness would have been certainly called upon to explain the circumstances under which he permitted his daughter to execute the mookhtearnamah.

I fully concur in the opinion that the Courts in this country should take great care that they do not enforce oppressive transactions to which the parties have not given a really free consent. But I am not prepared to set aside a contract, which, as far as I can see, was deliberately consented to, merely because a very heavy risk is provided for by a very high rate of interest. I do not mean to say that such transactions are desirable or should receive any favor. But I do not think they can on this ground alone be set aside as invalid. That would not be the application of any principle of equity, but a reintroduction by judicial decision of laws which have been expressly abolished by the Legislature. In this particular case, I feel the less regret at being compelled to enforce such an agreement, because, as it seems to me, had the defendants themselves acted straightforwardly, they might have escaped this onerous condition altogether.

The decree which the Lower Court has given is, as I understand it, a decree against all the defendants, except Fatima Begum, jointly for Rs. 20,000 with interest at Rs. 6-4 per cent. per mensem, from the date of the respective advances to the date of the Lower Court's decree, with costs, and interest upon the total amount at 8 annas per cent. per mensem from the date of the decree until payment; the representatives of the original parties to the ekrar being only liable in their representative capacity. I certainly do not quite understand the grounds upon which Fatima Begum has been exempted from her share of the liability, but as both parties have acquiesced in that part of the Subordinate Judge's decision, it cannot now be disturbed. The decree of the Subordinate Judge ought, in my opinion, to be affirmed, except that, looking to the very large sum the plaintiff has already added to the principal in the way of interest, I think the interest on the amount decreed should be reduced to 6 per cent. In all other respects, the appeal should be dismissed with costs.

The 31st July 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

User—Acquiescence.

Case No. 1882 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 19th August 1872, affirming a decision of the Moonsiff of that district, dated the 11th January 1872.

Nil Kant Sahoo (Defendant) *Appellant,*

versus

Jujoo Sahoo (Plaintiff) *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Nil Madhub Sen for Respondent.

In a suit to enforce a right of easement on the ground of user, the Lower Appellate Court was held to have done wrong in refusing to go into enquiry as to the length of time plaintiff had enjoyed the user because the right of the defendant also was of very short standing.

A party cannot be allowed in equity to stand by and see his own rights infringed without complaining in any way of such infringement, but is bound at once to do his best to prevent a permanent obstacle being put in the way of his enjoyment of those rights.

Phear, J.—THE plaintiff in this case sued to enforce his right to an easement in the shape of a drain passing across the land of the defendant. He did not make the claim under a specific grant of the easement from an owner of the land. He relied upon user for a time sufficient to confer the right upon him.

The suit was brought in October 1871 : and at that time the provisions of the new Limitation Act were in operation. According to that enactment twenty years' user as of right is necessary for the purpose of establishing the right of an easement of this kind. And therefore in the present case it is incumbent upon the plaintiff to make out that he has used the drain which he seeks to have kept open for his benefit for a period of at least twenty years before the date of the institution of his suit.

The Subordinate Judge has declined to enter into any enquiry as to the length of time during which the plaintiff has had user of this drain, because he says, however short the duration of the user of the plaintiff may be, "the right of the defendant also is of very short standing : nay, it is of the time subsequent to that when the drain used to run." He goes on to say :—"He has no right to prevent the plaintiff from the use of his drain."

Clearly, the Appellate Court was wrong in refusing to go into that question, and consequently the decree must be reversed. But whether the case is to be sent back or not depends upon the question whether or not there is evidence on the record legally sufficient to establish the plaintiff's allegation of right. We find, however, on enquiry that there is no evidence on the record of such user of the drain as would be necessary for the purpose of establishing the right of easement claimed. None of the witnesses who speak to user, carry that user so far back as twenty years before suit.

Also with regard to the issue raised between the parties relative to the chubootarah,—although we are told that the right of passage or way for the bullocks was not disputed, we cannot find that there is any evidence upon which the Court could come to the conclusion that that right of passage had been interfered with by the erection of the chubootarah ; and therefore it must be useless to send back the case for the retrial of this issue likewise.

The result is that the decrees of both the Lower Courts must be reversed, and the suit of the plaintiff dismissed with costs in all the Courts.

We will add that, supposing that the plaintiff had the right which he alleges in this case, he could not be allowed in equity to stand by and see the defendant building a house and erecting a chubootarah before he complained in any way of his right being infringed by those acts. He was bound at once to do his best to prevent the defendant from putting a permanent obstacle in the way of the enjoyment of his rights. If he silently stands by and permits him to go to the expense of erecting a building upon his own land before he complains, a Court of equity ought to be very slow to listen to his complaint when the consequence of giving effect to that complaint will be to cause a very considerable damage and loss to the defendant.

The 31st July 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Nuksan Jotes—Ootbundi Tenures—Right of Occupancy.

Case No. 402 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 2nd September 1872, reversing a decision of the first Moonsiff of that district, dated the 29th January 1869.

Premanund Ghose (Plaintiff) *Appellant,*
versus

Shoorendronath Roy (Defendant)
Respondent.

Baboo Issur Chunder Chuckerbutty for
Appellant.

Baboo Rash Beharee Ghose for
Respondent.

Where by the custom of a particular locality rent was not payable when the land was not culturable, and the ryot paid rent only for the period that he could cultivate, he would still come within the meaning of the provision of the law which declares that a ryot who held or occupied land for a period of twelve years had a right to occupy the land so long as he paid the rent due thereupon.

Jackson, J.—It was clearly proved in this case in the opinion of the Court of first instance that the plaintiff had cultivated this land, and that he had held the land for a period of more than twelve years, and he was therefore declared entitled to possession. The case had been tried several times in the Appellate Court without a final conclusion having been come to. On its coming now before the present District Judge he thinks that the plaintiff cannot succeed, because he sought for possession, in virtue of what he calls jummai right, whereas the evidence shows that plaintiff and his father before him occupied this land as "nuksan jote." "Nuksan jote," as we understand, is very much the same as ootbundi. The Judge observes:—"It is quite certain that a "nuksan jote might become a jummai jote, "but it is equally certain that if a man sues "to recover land which he himself shows to "have been nuksan jote as jummai, it is "incumbent on him to show when and how "the transition took place. It appears that "plaintiff's father had possession of the "subject of suit, and if the plaintiff had "sued for a declaration of his right of occu-

"pancy it is very probable he would "have "been entitled to a decree, but as he wishes "to have it declared that the land his father "held as nuksan jote is his jummai land "derived from his father, he is bound to "show when the nature of the tenure of that "land changed; and this he has not done." For this reason it appears that the Judge regards nuksan jote as not merely something entirely different from jummai, but also as being incompatible with the right of occupancy. When the Legislature declared that a ryot who held or occupied land for a period of twelve years had a right to occupy that land so long as he paid the rent due thereupon, we apprehend that when by the custom of a particular locality rent was payable when the land could be cultivated, and not payable when the land was not culturable, and the ryot paid rent for the period that he could cultivate, and did not pay when he could not cultivate the land, he is to be considered as having held and as having paid the rent sufficiently to come within the meaning of the law. We apprehend there is nothing in an ootbundi tenure incompatible with the right of occupancy.

This being the only ground on which the judgment of the Moonsiff has been set aside, it appears to us that the judgment of the Lower Appellate Court must be reversed, and that of the Moonsiff restored with costs.

The 1st August 1873.

Present :

The Hon'ble Dwarkanath Mitter, *Judge.*

Act VIII (B.C.) of 1869 s. 29—Premature Suits.

Case No. 105 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 30th September 1872, modifying a decision of the Moonsiff of Pundooah, dated the 12th March 1872.

Taramonee Debia and others (Defendants)
Appellants,

versus

Joykisto Mookerjee (Plaintiff) *Respondent.*

Baboo Umbika Churn Banerjee for
Appellants.

Mr. C. Jackson and Baboo Anund Chunder Ghossal for Respondent.

The object of Act VIII (B.C.) of 1869 s. 29 is to fix the maximum of time within which suits for arrears

of rent at enhanced rates ought to be brought; not to create a bar to the institution of such suits before the expiration of the year on account of which the arrears are claimed.

Mitter, J.—I AM of opinion that this special appeal ought to be dismissed with costs. The objection that the suit was premature appears to me to be quite untenable. The words (Section 29 Act VIII of 1869 B.C.) "Provided that if the suit be for the recovery of rent at a higher rate than was payable in the previous year, such rent having been enhanced after issue of notice under Section 13 of Act X of 1859, or under Section 14 of this Act; and the enhancement not having been confirmed by any competent Court, the suit shall be instituted within three months from the end of the Bengal year, or of the month of Jeit of the Fuslee or Willayuttee year on account of which such enhanced rent is claimed," do not, in my opinion, admit of the construction that a suit for arrears of rent at enhanced rates cannot be brought before the expiration of the year on account of a portion of which such enhanced rent is claimed. In the very first part of Section 29 Act VIII of 1869 (B. C.) similar words are used, "suits for the recovery of arrears of rent shall be instituted within three years from the last day of the Bengal year." But it cannot, in my opinion, be contended that a zemindar is not entitled to sue for such arrears as have already fallen due in the course of a particular year before the expiration of that year. The object of the Legislature in enacting Section 29 was to fix the maximum period of time within which suits for arrears of rent at enhanced rates ought to be brought, and not to create a bar to the institution of such suits before the expiration of the year on account of which the arrears are claimed.

The second objection relates to the notice of enhancement. I have read the notice and I am of opinion that this objection also must fail. It is true that the words used in the notice are not precisely the same as those used in the Act itself; but nevertheless whatever defect there might have been in the notice, appears to have been fully cured by the evidence which was produced by the plaintiff in order to make out the grounds of enhancement upon which he relied.

The third and last objection relates to that portion of the disputed land which was claimed by the defendant as lakheraj. The Judge of the Lower Appellate Court has

found as a fact that the plaintiff has established by *prima facie* evidence that the lands in question were māl lands of his zemindaree, and he has further found that the defendant has altogether failed to prove that they were his lakheraj lands. It has been said that the onus of proof has been unjustly and erroneously thrown upon the defendant. But this objection appears to me to be altogether unfounded. The Judge starts by saying that the plaintiff has made out a *prima facie* case, and he then goes on to enquire whether that case had been rebutted by the defendant. This last objection, therefore, must also fail.

The appeal is accordingly dismissed with costs.

The 2nd August 1873.

Present:

The Hon'ble Dwarkanath Mitter, *Judge*.

Declaratory Suit—Title—Adverse Possession.

Case No. 789 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 28th December 1872, affirming a decision of the Moonsiff of Behar, dated the 30th July 1872.

Umbika Soonduree Dossee (Plaintiff)
Appellant,

versus

Shama Churn Goocho and others (Defendants)
Respondents.

Baboo Romesh Chunder Mitter for
Appellant.

Baboos Nullit Chunder Sen and Chunder
Mohun Sen for Respondents.

Quære.—Would proof of adverse possession for more than twelve years be insufficient for the maintenance of a suit for a declaration of title?

Mitter, J.—In this case, although I am not prepared to say that the decision of the

Subordinate Judge is very satisfactory, I feel myself bound to hold that it is one with which I cannot interfere in special appeal. There is no reason whatever to suppose that the documents relied upon by the special appellant have not been duly considered by the Subordinate Judge, and I am not aware of any law which makes it imperative on a Court of Justice to refer to every piece of evidence, oral and documentary, on the record. Whether the Subordinate Judge was right in laying it down as a proposition of law that proof of adverse possession for more than twelve years would not be sufficient for the maintenance of the plaintiff's suit, because that suit was one for declaration of title, is a question upon which I do not wish to express any opinion at present. The Subordinate Judge has found upon the evidence that the possession of the plaintiff's husband was not of an adverse character, but that it was a possession held by him as the managing member of a joint undivided family. It is said that there is no evidence on the record to support the finding that the plaintiff's husband was the manager of the joint undivided family; but whether this be true or not, it appears to be quite clear that, in the absence of any satisfactory evidence on the other side, the Subordinate Judge was warranted in holding that the family continued to be joint. The admissions relied upon by the special appellant cannot be treated as estoppels. At the most they are mere items of evidence which it was for the Subordinate Judge to deal with in the best manner he thought proper. It is also worthy of remark that the cardinal point upon which the plaintiff rested her case has not been made out by any satisfactory evidence, that point being that by virtue of an arrangement between her husband Juggut Chunder on one side, and Kala Chand, Gudadhur, and Gopal Kristo on the other, her husband obtained the share in the ancestral property for which the present suit is brought. This was the allegation upon which the plaintiff rested her case in the Court below, and it was for her to give satisfactory evidence to establish its truth. This she has failed to do, and under the circumstances, whatever view I myself would have come to if I had to deal with the evidence in the case, I feel myself constrained to say that I see no ground to interfere with the decision of the Subordinate Judge in special appeal. The appeal is therefore dismissed with costs.

The 5th August 1873.

Present :

The Hon'ble F. A. Glover and E. G. Birch,
Judges.

Jujmanee Right—Offerings.

Case No. 1910 of 1872.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 7th August 1872, modifying a decision of the Moonsiff of Indoss, dated the 18th December 1871.

Jadub Chunder Chuckerbutty (one of the Defendants) *Appellant,*

versus

Bhubo Soonduree Dabee (Plaintiff)

Respondent.

Baboo Mohendro Lall Mitter for Appellant.

Baboo Kalee Prosunno Dutt for Respondent.

The phrase "jujmanee right" was construed to mean the right to participate in the offerings made to the idol, and not the offerings or presents which were made to the priest himself.

Glover, J.—Two questions are raised by the defendant (special appellant) in this appeal; the first as to the plaintiff's right to recover the two plots of land Nos. 27 and 28 the second as to the right to receive a share of the jujman's offerings or what is called in the decree the "jujmanee right."

The special appellant contends that the plaintiff's husband's right in both these properties was personal only, and did not descend to his heirs.

The Judge has found that the land (plots Nos. 27 and 28) was heritable property; and when we find that, on the death of the first donee Ram Chand, it passed without objection to his sons, one of whom was the plaintiff's husband, and that the shares of at least two of these sons have passed to their surviving brothers, we consider that the Judge was right in holding that the property was one which was heritable, and that the plaintiff was competent to take it as heir of her husband, she making due provision with the other share-holders for the performance of the idol services. It is a matter of every day occurrence for women to perform such services vicariously.

Some doubt has arisen as to the exact meaning of the Judge's finding on the second question, the "jujmanee right." The special

appellant contends that the Judge has given the plaintiff the right to insist on receiving from her late husband's *ujmans* the offerings which they were accustomed to make to him during his life time. The respondent, on the other hand, declares that her right under the decree extends merely to taking a share of the offerings actually made to the idol.

Both parties are, however, unwilling that this litigation should be protracted by a reference to the Judge, and are content to take the Court's interpretation of the words "*ujmanee* right."

And we have no doubt that this ought to mean, and in all probability does mean, the right to participate in the offerings made to the idol. No Court could compel the *ujmans* of the deceased priest to continue their presents or offerings to his widow. The right or rather privilege was a personal one, and was continued because the *ujmans* chose to pay that particular priest rather than another.

The question has been discussed more than once both in this Court and in the late Court of Sudder Dewany Adawlut, and has always been decided after this manner.

The special appeal is dismissed, but under the circumstances each party will pay their own costs.

The 6th August 1873.

Present:

The Hon'ble Louis S. Jackson and G. G. Morris, *Judges*.

Small Cause Courts—Jurisdiction.

Case No. 447 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 13th July 1872, reversing a decision of the Moonsiff of Muzoodpore, dated the 7th October 1871.

Mohesh Chunder Mojomdar and others
(Plaintiffs) *Appellants*,

versus

Jharoo Kholee (Defendant) *Respondent*.

Baboo Bungshee Dhur Sen for Appellants.

Baboo Grija Sunkur Mojomdar for
Respondent.

The Court of Small Causes having declined jurisdiction in a suit, plaintiff filed it in the Moonsiff's Court where it was dismissed as being cognizable by the Small Cause Court. In appeal, the Subordinate Judge decided the case, which was then brought before the High Court in special appeal:

Held that the case was cognizable by the Small Cause Court, and the Subordinate Judge's decision having been without jurisdiction could not be upheld.

Jackson, J.—It appears to me that the Subordinate Judge in deciding this appeal went beyond his province in determining a point which had been previously settled by his predecessor at the first hearing of the appeal. Still it appears plain enough that the suit was really cognizable by the Small Cause Court. The plaintiffs originally thought so and brought their suit there. The Small Cause Court took an erroneous view and declined jurisdiction. The case being afterwards filed in the Moonsiff's Court, the defendant in turn took the objection that the suit was cognizable in the Small Cause Court and succeeded in having it dismissed on that ground. The plaintiff is very much to be pitied, but we cannot uphold a judgment which is passed without jurisdiction. The best thing we can do is to order the Small Cause Court to entertain the suit on the present plaint and after hearing the case to give judgment. But there is a still better thing to be done, that is, for the parties to come to a mutual understanding as to what is justly due to one side or to the other, and thus save themselves the troubles and expenses of further litigation. The order of this Court is that the judgment of the Lower Appellate Court being set aside, each party will bear his own costs of this litigation. But this will not prevent the plaintiffs from recovering from the defendant the costs of the suit if they succeed in the Small Cause Court.

Morris, J.—I concur in thinking that the circumstances of the case require that it should be transferred for trial to the Small Cause Court.

The 19th July 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Sale for Arrears of Rent—Collusion.

Case No. 1167 of 1872.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 30th April 1872, affirming a decision passed by the Moon-siff of that district, dated the 30th September 1871.

Kishore Chunder Sein (one of the Defendants) *Appellant,*

versus

Kally Kinkur Paul Chowdhry and others
(Plaintiffs) *Respondents.*

Baboo Mohinee Mohun Roy for the Appellant.

Baboo Nullit Chunder Sein for the Respondents.

Where the sale of a tenure for arrears of rent was brought about by collusion between the party in whose name it stood and the purchaser, with a view to get rid of a co-sharer who had neglected to have his share transferred to his name,

Held, that the transaction was a private sale, and not really an auction sale for the purpose of realizing the zemindar's rent; and that, on payment of his share of the rent, the above sharer was entitled to have his share re-conveyed to him.

Markby, J.—In this case it appears that the respondent had purchased a share in a tenure in which Bhyrub Chunder held another share. Bhyrub Chunder disputed the respondent's title and kept him out of possession, but the respondent obtained a decree, and recovered possession on the 19th January

1866. The tenure was recorded in the name of Bhyrub Chunder, and the rent of the whole was paid regularly up to the month of May 1868, but how or by whom does not appear. The respondent had not, however, taken the necessary steps to have the share which he had purchased transferred to his name.

The rents for June and July 1868 were not paid. A suit was brought against Bhyrub Chunder, in whose name the tenure stood; judgment was recovered; and the tenure sold nominally to Kishore Chunder Sein, Bhyrub Chunder's brother-in-law and the appellant before us, but Bhyrub Chunder is still in possession. Both the Lower Courts have found that the default in payment of rent was wilfully made by Bhyrub Chunder, and that his object was to bring about a sale of the tenure in order to get rid of the respondent's claim to a share in the property, and also that the person who represented the zemindar in these proceedings was acting in collusion with the purchaser in not giving the proper notices for the sale and in the conduct of the sale itself.

The Subordinate Judge holds that such a proceeding by a co-sharer was a fraud, and could not give Bhyrub Chunder or the appellant any title to the respondent's share; and has, therefore, given the respondent a decree to recover possession of his share.

Bhyrub Chunder is a defendant in the suit, but has not appealed. He has allowed the contest to be conducted throughout by the nominal purchaser, Kishore Chunder Sein.

For the appellant it is contended that this was no fraud. It is contended that there can be no fraud without misrepresentation, whereas in this case there was no misrepresentation; that, had the respondent shown due diligence in looking after his own interests, he would have had his name recorded as a shareholder in the tenure, in which case no sale could take place without his knowledge; that a shareholder is not bound to protect the interests of his co-sharer; and that the appellant and Bhyrub Chunder had full right to take any advantage they could of their position to get rid of the respondent, who was obnoxious to them.

Had there been no collusion between Bhyrub Chunder, whom the Court below considers to have been the real purchaser at the auction sale and the zemindar's agent, I am not at this moment prepared to say that

the respondent could have recovered his share. I do not wish to be understood as deciding anything upon that point. But it being found that there was collusion between the purchaser and the person who conducted the sale, the case falls within the principle of the decision of the Privy Council in the case of Nuzzur Ally Khau, 5 W. R., P. C., 81. The gist of that decision appears to be that, as the sale was not really a public one for the purposes of realizing revenue, but only a device to give to what was really a private transaction the incidents of a public sale, it ought to be treated as a private sale only. So it seems to me here that there was not really an auction sale for the purposes of realizing the zemindar's rent, but only a private transaction between the appellant and the zemindar's agent carried on under the appearance of an auction sale. And I think the decision of the Privy Council warrants us in holding that whatever may be the forms gone through, no one will be allowed by means of a fictitious auction sale to cause a loss to another, and a benefit to himself.

Upon these grounds, therefore, I think the judgment of the Courts below is right and ought to be affirmed; but, as pointed out in the case reported in 14 W. R., 159, I think the proper course is to direct the appellant to re-convey to the respondent his share in the property. The appellant is entitled to a refund of so much of the purchase money as was applied to the satisfaction of the plaintiff's share of the rent then due, which the parties have agreed to fix at Rs. 5.

That the appeal be dismissed; that it be declared that neither the defendants nor any or either of them are or is entitled to the 12 gundahs 2 cowries and 1 krant share which was sold at the sale for arrears of rent; and that, upon payment to the appellant by the respondent of the sum of Rs. 5, the appellant do execute a conveyance of the said share to the respondent, such conveyance to be prepared by the respondent and tendered to the appellant for execution; and if the appellant shall neglect or refuse to execute the conveyance when required, the conveyance is to be executed by the Moonsiff. Costs of the stamp for the conveyance and fees for registration to be added to the costs of this appeal, and recovered from the appellant with interest at 6 per cent. The respondent to obtain possession of the land immediately upon execution of the conveyance.

The 1st August 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Acknowledgment of Refund of Consideration for Mortgage—Registration—Act XX of 1866 s. 17 cls. 2 & 3—Evidence.

Case No. 176 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 27th May 1872.

Sheikh Gugunfur Ali and another
(Plaintiffs) *Appellants*,

versus

Mahomed Yaseen and another (Defendants) *Respondents*.

Mr. C. Gregory and Babdo Chunder Madhub Ghose for Appellants.

Moonshee Mahomed Yousuff for Respondents.

A document acknowledging the re-payment of consideration money advanced upon a mortgage is not required by Act XX of 1866 s. 17 cl. 3 to be registered, neither can it be treated as an instrument which purports or operates to limit or extinguish any right, title, or interest to or in immoveable property within the scope of cl. 2. Such a document is admissible as evidence without registration.

Phear, J.—The plaintiffs "sue the defendants to recover Rs. 6,638-6-6 principal with interest, which was payable by them on the 25th Magh 1278 as per detail in the "ikrarnamah in the shape of a mortgage-bond, bearing registration dated the 29th July 1870."

The plaintiffs have obtained a decree for a portion of this money in the Court below, but that Court has refused to decree the full amount on the ground that payment, or an acknowledgment in the way of payment, has been proved against the plaintiffs by the production of a certain document which has been called a receipt signed by them. The plaintiffs deny that this receipt was signed by them, and also maintain that it is not admissible as evidence inasmuch as it is not registered.

We have had the ikrarnamah upon which the plaintiffs sue and also this receipt translated, and we have taken time to consider the effect of the evidence in this case so far as it bears upon the question whether the plaintiffs signed this document or not.

We have arrived at the conclusion that the plaintiffs undoubtedly did sign this receipt, and that they gave it to the defendants as an acquittance in respect of so much of the money secured by the ikrarnamah as was covered by it. The evidence upon this point appears to us exceedingly strong.

One Morad Ali, who does not seem to have any personal interest in the matter, and was admittedly present at the time when certain acknowledged kobalahs were executed by the present defendants in favor of the plaintiffs, states that at that time this receipt was signed by the plaintiffs in his presence, and delivered as a receipt to the defendants. There can be no doubt at all as to his statement on this point. He says that, after these documents, on the one side and the other, were signed, all parties went to the Registration office. And he says further that he went with the parties to have the documents registered. The plaintiffs admit that the three deeds of sale were executed in their presence as Morad Ali asserts; they admit that Morad Ali was present then; they admit that they and the defendants all went to the Registration office, and that Morad Ali was with them as he mentions. But they deny that they ever signed this receipt, or had anything to do with it. The evidence which they themselves give upon this point is anything but satisfactory, and their stories differ with respect to some material facts.

Then the mohurrir of the Registration office,—not to speak of other witnesses,—the mohurrir says:—He remembers these persons coming with these documents for registration just in the way that Morad Ali says they did. The three kobalahs were registered, but when they came to the registration of the other document—a receipt—it was objected by the Registration officers that it was not sufficiently stamped. The document itself has been produced, and has been spoken to both by this mohurrir and by Mr. Jones the Sub-Registrar. It bears an endorsement upon it in red ink, signed with the initials of Mr. Jones purporting to have been made on the 19th January 1871, the very day upon which the other kobalahs were registered, and this endorsement is to the effect that it be sent to the Collectorate to ascertain whether the stamp is sufficient or not. Mr. Jones and the mohurrir say that it was sent to the Collectorate in January, and that it did not come back to them again till June. When it did come back, it bore an endorsement of the Collectorate officer stating that the stamp was

sufficient. And thereupon Mr. Jones cancelled the endorsement in red ink, putting his initials in black ink against the cancelment; that the present defendants were informed some time after this by the Registration officers that the document had returned from the Collectorate. They then took steps to get the present plaintiffs to come to the office for the purpose of consenting to its registration, but they refused to do so. Summonses were issued for the purpose of compelling their attendance, and then they denied, one or both of them denied, that they were executants. Upon this, of course, registration was refused.

It seems to us that there can be no sort of doubt about these facts, and most unfortunate it is that things should have occurred as they did occur. Had not Mr. Jones blundered in the matter of the stamp, it is impossible to doubt that this document would have been registered at the same time as the other deeds were registered, and there never would have been the smallest opportunity afforded to the present plaintiffs for disputing the force and the validity of the receipt.

If then this receipt is admissible in evidence, it was rightly taken by the Lower Court to amount to an acquittance of the defendants so far as regards that portion of the plaintiffs' claim which is comprised in the receipt. By the account of both parties, the ikrarnamah, in the shape of mortgage, upon which the plaintiffs sue, was given by the defendants for the purpose of securing payment to the plaintiffs of a certain sum of money—Rs. 18,000 odd—which, as between the parties to the instrument, was taken at the time to have been advanced by the plaintiffs to the defendants, or rather was acknowledged to be a debt due from defendants to the plaintiffs. This receipt was in truth an acquittance to the defendants by the plaintiffs, or release from liability in respect of Rs. 7,000 odd, part of that Rs. 18,000. It was not, properly speaking, a receipt of money actually paid, because there had previously been no actual advance of the money which constituted the mortgage debt, but it was a release of the defendants' personal obligation to pay Rs. 7,000 odd, portion of the money secured by the ikrarnamah.

The next question then is, is this document receivable as evidence between the parties notwithstanding it is not registered?

It is urged on behalf of the plaintiffs that this is a document which falls within the

description of Clause 3 Section 17 Act XX of 1866.

Clause 3 of that section runs thus:—
“Instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest.”

And the words “such right, title or interest” refer to the definition to be found in Clause 2 of the same Section, which says:—“Instruments (other than an instrument of gift), which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property.”

It is argued that this document is an instrument which acknowledges the receipt or payment of consideration on account of the creation of a title or interest in immoveable property. But it seems to us that this contention is not correct. The consideration for the ikrarnamah, or the mortgage, was the existing debt which was acknowledged by the covenant in the same deed on the part of the defendants to pay the Rs. 18,000 odd; or more correctly, was the remainder of the entire transaction of which the execution of the ikrarnamah by the defendants was only a part. If, instead of its being in this shape, the consideration had been an actual advance of Rs. 18,000 made by the plaintiffs to the defendants, then an acknowledgment of the receipt or payment of that consideration money, or a portion of that consideration money, would necessarily have been made by the person to whom that consideration was paid. In other words, it would have been made by the person creating the interest and who acknowledged by that document that he had received the consideration for creating the interest. It stands, so to speak, upon the same parallel as the creation of the interest itself: the one party creates the interest in the immoveable property; the other party gives the consideration for it; and the receipt of that consideration, if the consideration is received, must be on the part of the person who creates the interest. And we apprehend that it is because the acknowledgment of receipt of the consideration money for the creation of an interest must necessarily be by the hand of the person who created the interest, and would be therefore equally efficacious to bind him as evidence of the creation of the interest as the actual instrument by which it was created, constituted

the reason why the Legislature enacted that which is enacted in Clause 3 of Section 17. It did not proceed to say that the return of the consideration money when it had been received, or a document acknowledging the re-payment of the money advanced upon a mortgage, must be registered. The enactment is that an instrument acknowledging the receipt of the consideration money for the creation of the interest must be registered. Neither can this document be treated as an instrument which purports or operates to limit or extinguish any right, title, or interest to or in immoveable property within the scope of Clause 2 Section 17 Act XX of 1866, for it in no way affects the extent of the mortgage or the amount of the money charged on the immoveable property: at most it furnishes evidence to the effect that part of the charge has been raised, part of the mortgage debt re-paid. And no other passage in the Registration Act seems to bear upon the question before us. Therefore, in our judgment, there is nothing in the Registration Act to prevent this document from being admissible as evidence between the parties, and we think that the right effect has been given to it in the Court below. It follows, therefore, that this appeal must fail, and we accordingly dismiss it with costs.

The 1st August 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Hindoo Law (Mitakshara)—Joint Family Property—Partition—Father—Son—Mother.

Case No. 1493 of 1872.

Special Appeal from a decision passed by Officiating Judge of Bhaugulpore, dated the 27th July 1872, reversing a decision of the Subordinate Judge of that district, dated the 13th September 1871.

Lalljeet Singh, (Defendant) *Appellant,*

versus

Raj Coomar Singh (Plaintiff) *Respondent.*

Messrs. J. H. A. Branson and C. Gregory and Baboo Romesh Chunder Mitter for Appellant.

Mr. J. T. Woodroffe and Baboos Mohesh Chunder Chowdhry and Kalee Prosunno Dutt for Respondent.

In a joint family, under the Mitakshara law, the father during his life may at his pleasure partition the whole of the property in his hands, or any of it; and if he

does so, he must allot a share to his wife for her maintenance in addition to the share which he takes himself; also the sons can at any time during the father's life, at their pleasure (even when any of the contingencies which entitle them to divide the whole estate have not happened) call upon him to partition the ancestral property, and in that event also the mother must have her share as before.

After the father's death, the sons may divide the property among themselves; but then too they must give a share to their father's widow, and to an unmarried sister, if there is one. In all the cases alike the mother's share in the ancestral property must be equal to that of a son.

Phear, J.—IN this case a son sues his father and his brother, who is a minor, to obtain partition of certain ancestral property, the family being a joint Hindoo family governed by the Mitakshara law.

Two principal questions have arisen in the suit: first, whether a son can sue his father to obtain partition of ancestral property during his father's lifetime; and secondly, whether if he does so, and the mother is alive, the mother is entitled on the partition to have a share by way of maintenance or otherwise.

In this case it is admitted that the mother is alive, and the plaintiff has not made her a party to the suit: not only has he omitted to make her a party to the suit, but he maintains that she has no right to a share on any ground, and ought not to be a party to the suit.

With regard to the first issue just mentioned, a decision of the Madras Court, which is reported in I Madras Reports, page 77, has determined that a son can sue during his father's lifetime for partition of the ancestral estate. A decision of a Full Bench of this Court, reported in VI Weekly Reporter, page 18, is to the like effect. Also a judgment delivered by a Division Bench of this Court, which is reported in IX Weekly Reporter, countenances the proposition that, on a division of the ancestral property during the father's lifetime, his wife is entitled to a share for her maintenance, although, no doubt, it does not judicially determine the point.

Notwithstanding these authorities bearing upon both these issues, it was very strongly urged upon us on behalf of the defendant on the one side, and on behalf of the plaintiff on the other, that neither proposition was well-founded in Mitakshara law. We have thus felt it necessary to examine somewhat closely the text of the Mitakshara so far as it bears upon these two issues.

The first Section of Chapter I may be described as an elaborate discussion and somewhat artificial analysis of several ancient texts,

serving to lead up to the conclusion that each member of a joint Mitakshara family acquires by birth a certain indefinite right of property in the paternal and ancestral estate; that the father or head of the joint family has an independent power of disposal for certain purposes of the family effects other than immoveable property, but is subject to the control of his sons and the rest of the family in regard to the immoveable estate whether acquired by himself (though it must be remarked by the way that this is afterwards greatly modified, Section V, paragraph 10) or inherited from his father or other predecessor (paragraph 27): with, however, this one exception relative to the control, namely, that, while the members of the joint family are minors, or incapable of giving their consent to a gift and the like, one member of the family may conclude a gift, hypothecation, or sale even of the immoveable estate if a calamity affecting the whole family require it, or support of the family render it necessary, or indispensable duties such as the performance of the father's shraddh makes it unavoidable (paragraph 29).

The three last paragraphs but one of the same Section, *i.e.*, paragraphs 30, 31, 32, furnish an interpretation of two or three texts which, without it, would seem inconsistent with the foregoing view of the law; and explain that these texts only refer to certain precautionary formalities, which ought to accompany, but which are not essential to the validity of any dealing with joint family property.

And the last paragraph (33) reserves to a later part of the commentary, the mention of a certain distinction between the right acquired by birth in paternal, and that in ancestral, estate.

We find this distinction reasoned out in Section V, and given concisely in paragraph 10 of that Section. One effect of it is, as already stated, to relieve the father from the control of his sons as regards his acquired property.

The indefinite right in the joint property which as thus explained is acquired by birth, is capable of being rendered personal (so to speak) and separate by partition; and in the next paragraph (which Mr. Colebrooke has made the first paragraph of Section II) the commentator proceeds to consider "at what time, by whom, and how partition may be made." For this purpose he first cites the text of his author (Yajnavalkya), which runs thus:—"When the father makes a partition, let him separate his sons from himself at

"his pleasure, and either dismiss the eldest with the best share, or if he choose, all may be equal sharers." After developing this text slightly, the commentator says in paragraph 6 that the power of *unequally* distributing the property which it confers on the father relates solely to his self-acquired property, because unquestionably he has not such power in regard to ancestral property by reason of equality of ownership therein on the part of himself and his sons, which the commentator undertakes to explain later, and which he does explain (as already mentioned) in paragraph 10 of Section V. The text with this qualification in effect may be put thus:—"When a father makes a partition, he may give his children equal or unequal shares, as he thinks fit, except that in partitioning ancestral property he must give them equal shares." This method of first deducing the general proposition from one text or authority, and then cutting it down by an exception made on the foundation of another, prevails through the whole of the commentary.

The commentator next proceeds to state the occasions on which a partition may be effected, a step which ought logically to have been taken previously to making any mention of the father's powers of distribution; for, taken here, it effects a break in the continuity of the discussion relative to the question of shares on partition. These occasions are (paragraph 7) at the pleasure of the father during his life, at the pleasure of the sons after his death, and also at the pleasure of the sons during his life against his will, provided that certain specified events occur. Nothing appears here to limit the application of this passage to the partition of the father's self-acquired property only: the partition of his property *generally*, ancestral as well as self-acquired, seems to be meant, and the Madras High Court has so interpreted the paragraph (I Madras, 77). This view is confirmed incidentally by a remark which is made by the commentator in paragraph 4 of Section III, and which will be presently referred to. Besides these occasions of partition, paragraphs 8 and 10 of Section V, no doubt, add another, namely, at the pleasure of the sons during the father's life so far as regards ancestral property: and therefore the like result would in the end be reached, if we supposed the previously mentioned occasions of partition to have been spoken of in regard to self-acquired property only, excepting that under that supposition there would be no direct authority anywhere for

the father's partitioning the ancestral property during his life; and that there is certainly no reason afforded for this limitation upon the exercise of the father's discretion. On the whole, there seems to be no cause to impeach the justness of the Madras High Court's opinion, and much to support it.

At the point which we have now reached, the commentator returns to the question relative to the amount of the shares. He says (Section II, paragraph 8):—"Two sorts of partition at the pleasure of the father have been stated, namely, equal and unequal," and after quoting a text of Yajñavalkya ("If he make the allotments equal, his wives, to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions,") he represents the effect of it to be that "when the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by the husband or the father-in-law, must be made partakers of shares equal to those of sons. But if he give the sons unequal shares, his wives do not take such portions, but receive equal shares of that which remains after the allotments to the sons have been deducted."

As in the previous Section, there is nothing here expressed to limit the application of these passages to the partition of self-acquired property alone, unless it be the words "by his own choice;" but these seem to refer rather to the act of partition than to any discretion in regard to the magnitude of the shares. And the upshot of it all appears pretty plainly to be that, while the father in partitioning the property which he has, of whatever kind, may in some cases make a difference in the shares which he gives to his sons, he must in no case make any in the shares which he gives to his wives. There arises, further, the inference that in all cases of a partition by the father his wives are entitled to the shares mentioned, and this inference is rendered certain by paragraph 1 of Section VII, which will be quoted hereafter. In the remaining paragraphs of Section II, the commentator points out cases in which a father may be justified in giving even a nominal share to a son, and also that a legally effected distribution by the father in unequal shares cannot be set aside. This can only be done when the father has acted under undue influence, and so on.

In the paragraphs of Section III, the question of partition at the instance of the

sons after the death of the father and mother is dealt with, and although this particular topic is a little remote from that which is before us, yet the reasoning by which the result, namely, that brethren should divide only in equal shares (paragraph 7) is reached exhibits some points which are of use to us, and for that cause has been already alluded to. At the outset of the Section, the commentator represents his opponents as objecting that such text as that of Yajñavalkya (quoted in Section II):—"Let him either dismiss the eldest with the best share, &c.," sanction an unequal distribution of property when the division is made in the father's lifetime, and that consequently an unequal division is admissible at every period; but the answer which the commentator makes is, not that these texts were delivered in view of a special partition, as of self-acquired property only, but "true, this unequal partition is found in the sacred ordinances, but it must not be practised, because, amongst other things, there exist counter or qualifying maxims and texts." The commentator then goes on to argue that, inasmuch as "Apastamba declared, a father 'making a partition in his lifetime, should 'distribute the heritage' (i.e., the ancestral property, see Section I, paragraph 2) 'equally among his sons,' therefore the sons dividing his property after his death (when it must all of it necessarily be in the situation of ancestral property) must divide it only in equal shares.

We thus see it disclosed that the texts quoted in Section 2 are quite general in their original meaning, and are only restricted in operation, so far as they are restricted at all, by the force of other qualifying texts. We also see it recognized that the incidents of a partition effected at the instance of the sons must correspond strictly with those of a partition of a like property effected by the father. In this way it appears, at once, that the view which the Madras High Court took of the general scope of paragraph 7, Section II, is correct; that the directions of paragraphs 9 and 10 of the same Section with regard to shares of widows are equally general; and that these directions apply to partitions effected at the instance of sons, as well as those effected at the father's own pleasure only.

The paragraphs of Section IV only describe property which is of such a nature that it ought not to be divided. But those of Section V again revert to the distribution of joint property on partition. First, we had

the case of partition by the father of his own will during his lifetime; secondly, partition effected by the sons after the death of both father and mother of property generally which had been held by the father. Here, we have something supplementary and more particular. The commentator declares that, in the distribution of the grandfather's (i.e., ancestral) property whenever the partition takes place, the adjustment of the grandsons' shares must be effected through their father's: thus, if the father is dead when the partition takes place, the grandsons only get the share which would have fallen to their father had he been alive at the partition; and if he is alive, they only share with him what he gets. But the commentator states emphatically that in that share they are co-owners with the father; and in a partition of it have equal rights with him independently of his will. And he is at much pains to combat the contrary notion, saying in particular that the text "when the father makes a partition, &c.," which has been already quoted, and others, so far as they countenance unequal distribution by the father, apply to his self-acquired property only. He goes on further to pursue this doctrine to its consequence, and in paragraphs 8 and 11 demonstrates that the son can, at any time during his father's lifetime, demand, whether his father be willing or not, a distribution of the ancestral estate. Finally, in few words (paragraph 10) he sums up by stating the difference in the son's right to the father's and the ancestral property,—the distinction which he had previously promised to make. The paragraph runs as follows:—

10. "Consequently the difference is this:—Although he have a right by birth in his father's and in his grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating the property)."

Section VI commences with the question, how shall a share be allotted to a son born subsequently to a partition of the estate? This is discussed at great length with reference to the text "when the sons have been separated, one who is afterwards born of a woman equal in class shares the distribution," and the substance of the answer is

that he only gets a share of that which is left with the father and mother after the partition, and has no right whatever in that which had been allotted to his separated brothers; while they also, on the other hand, retain no right to any other portion of the father's estate of whatever kind, and get none in anything which the father may subsequently acquire. A passage in the second paragraph of the Section, in which it is said generally of the after-born son of the text, "what is distributed is distribution, meaning the allotments of the father and mother, he shares that," serves inferentially to show that in any distribution obtained during the lifetime of the father, without limitation as to the nature of the property, a share is allotted to the mother *as well as to the father*. And this seems to be made quite clear by the first paragraph of Section VII, which is as follows:—"When a distribution is made during the life of the father, the participation of his wives equally with his sons has been directed (if he make the allotments equal, his wives must be rendered

* Yajnavalkya.

"partakers of like portions)."

The author now proceeds to declare their equal participation when the separation takes place after the demise of the father. "Of heirs dividing after the death of the father, let the mother also take an equal share." The remainder of Section VII is taken up with the discussion of the rights of unmarried daughters as against the sons on a partition effected after the death of the father; but with this we are not now in any degree concerned, because the 14th and last paragraph of the Section declares that it is only after the decease of the father that the unmarried daughter participates in the inheritance. Before his death she obtains that only, whatever it be, which her father gives.

Thus, upon a review (unfortunately somewhat lengthy) of that part of the Mitakshara which affords materials relevant to the two principal issues which are before us, there appears to be no real obscurity. The result, so far as we are at present concerned, may be stated very shortly as follows:—The father, during his life, may, at his pleasure, partition the whole of the property in his hands or any of it; and if he does so, he must allot a share to his wife for her maintenance, in addition to the share which he takes himself: also the sons can at any time during the father's life, at their pleasure (even when any of the contingencies which

entitle them to divide the *whole* estate have not happened), call upon him to partition the *ancestral* property, and in that event also the mother must have her share as before. After the father's death, again, the sons may divide the property among themselves, but then, too, they must give a share to their father's widow and to an unmarried sister, if there is one. In all the cases alike the mother's share in the ancestral property must be equal to that of a son.

It follows, then, that we must determine the first of the two issues before us in favor of the plaintiff, but the second issue against the plaintiff. The mother being entitled, as we understand the text of Mitakshara, to a share in the ancestral property by way of maintenance upon the occasion of a partition being effected at the instance of the son, she ought to be a party to this suit; and inasmuch as she has not been made a party, the suit in its present form must certainly fail. The only question which remains is whether or not we ought to give the plaintiff any facility for the purpose of enabling him to carry on this suit upon the basis of the present plaint, by allowing him to amend it and to make the mother a party on the record.

We observe that, supposing the mother to be thus made a party, there is already one issue of fact, and there may arise other questions of fact upon which she will have a right to bring evidence and to insist upon a complete re-hearing of the case. There seems to be no actual agreement between the parties as to the property which is to be divided. And again, the father defendant has already set up that the plaintiff is estopped by what has taken place between them on a former occasion from claiming a partition of the ancestral estate, even assuming he has that right. The Courts below have come to the conclusion that this matter of estoppel is not made out against the plaintiff. But unquestionably the mother would be entitled, if she was so advised, and was upon the record, to have that issue tried afresh and to offer additional evidence upon it. So that if we send back this case with the direction that the mother be put upon the record, in order that the plaintiff may be enabled to carry on the suit properly, there must necessarily be a new trial in the first Court with regard to the facts which constitute the general merits of the case. This being so, we are bound to look at the behaviour of the plaintiff to satisfy ourselves whether or not he is entitled to this indulgence at our hands. Now it is quite clear

that he has from the commencement, as has already been stated, not only omitted to put the mother upon the record, but persistently refused to acknowledge her right to a share; and has up to this last Court of Appeal most strenuously fought out that issue.

We find, moreover, that both the Courts below are of accord with regard to the character of the contest between the plaintiff and his father. The Lower Appellate Court says:—"That the facts seem to show that the plaintiff is a profligate spendthrift whom his father has attempted to control, and yet the law must assist the extravagant son in dismembering the estate in spite of his father's objection."

We think, having regard to this finding and to all the other circumstances of the case which have been referred to, that we ought not to afford the plaintiff any special indulgence in this matter. The suit cannot go on as it is at present framed, and we shall limit ourselves to reversing the decision of the Lower Appellate Court, and dismissing the plaintiff's suit with costs. This decision will, of course, be without prejudice to his right to bring a future suit for partition making all the interested persons parties to it.

The 2nd August 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Tanks—Right of Occupancy—Sale—Regulation XIX of 1819.

Case No. 1900 of 1872.

Special Appeal from a decision passed by the Additional Subordinate Judge of East Burdwan, dated the 29th August 1872, affirming a decision of the Moon-siff of Sulimabad, dated the 9th May 1872.

Nidhi Krishna Bose (Plaintiff) Appellant,

versus

Ram Doss Sen (Defendant) Respondent.

Baboo Hem Chunder Banerjee for Appellant.

Baboo Sreenath Doss for Respondent.

A right of occupancy in land includes the same right in respect of a tank appurtenant to the land. But a right of occupancy cannot be acquired in a tank with

only so much land as is necessary for the tanks, and the lease of such tank is terminable on the sale of the lessee's tenure for arrears of rent, the purchase under Reg. XIX of 1793, receiving the tenure free of encumbrances.

Couch, C.J.—THIS may appear to be a hard case upon the defendant, if it is true that, having obtained a lease of this tank at a low rent, he has spent money upon improving it, not for any advantage to himself, but for the benefit of the inhabitants of the place. But it must be remembered, on the other hand, that, before he chose to do that, he might have learned that the lease to him would be subject to the contingency that has happened,—that the tenure of the person from whom he took the lease might some day be sold, and then the operation of the law would be to give to the purchaser the property freed of the lease. If persons choose to expend their money in that way, they must take the consequences of it.

The Regulation* says that, upon a sale such as there was here, the property is to be sold free of all encumbrances that may have accrued upon it by act of the defaulting proprietor.

There can be no doubt that this was an encumbrance, and when the law says that the purchaser is to have the property free of all encumbrances, it is not necessary to say that he shall be entitled to eject the persons who, by force of it, cease to have any title to possession. It may be that in modern Acts words stating that they may be ejected are added, but it is not necessary, nor would they be inserted in this Regulation, for the Regulations are drawn very concisely and not in the style which has since been adopted in framing Acts of the Legislature.

There can be no doubt then that the plaintiff has a right to recover possession of this tank, because it has been held that a right of occupancy is not acquired in a tank except under certain circumstances. Where land is let for cultivation, and there is a tank upon it, the tank would go with the land; and if there was a right of occupancy in the land, there would be a right of occupancy in the tank as appurtenant to the land. But here the tank is the principal subject of the lease, and only so much land passed with the tank as is necessary for it, namely, for the tanks. This, in reality, is the tank, and according to the decisions there cannot be a right of occupancy acquired in it.

It appears to us then that there is really no answer to the claim of the plaintiff who

* XIX of 1793.

has purchased at a sale under the Regulation. Hard as the case may be (I am not sure that it is really so hard as at first sight it appears, but supposing it to be so), we must give effect to the law. And there is no ground, according to any rule of equity, for saying that the plaintiff, who is entitled to the estate free from the encumbrances created upon it, is to compensate the lessee for the money which he has thought fit to expend. Having a lease which was at any time determinable by such an event as has happened, he must take the consequences of it, and can have no claim upon the plaintiff for compensation.

The decrees of both the Lower Courts must be reversed, and the plaintiff must have a decree for possession with costs.

The 6th August 1873.

Present:

The Hon'ble Louis S. Jackson and G. G. Morris, *Judges*.

Co-owners—Rents—Profits.

Case No. 439 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 18th November 1872, affirming a decision of the Moonsiff of Ghattal, dated the 23rd February 1872.

Raj Kishen Mookerjee (one of the Defendants) *Appellant*,

versus

Pearce Mohun Mookerjee (Plaintiff) *Respondent*.

The Advocate-General and Baboo Bama Churn Banerjee for Appellant.

Baboos Anund Chunder Ghosal and Chunder Nath Banerjee for Respondent.

Where one of two co-owners of land who are not joint, cultivates the land with the acquiescence of the other who stands by and offers no objection, the latter cannot claim a share of the profits, but only his proper share of rent.

Jackson, J.—It appears to us that the plaintiff in this case is not entitled to a share of the profits resulting from the cultivation of the land. It appears that the plaintiff and the defendant, although they were co-owners of the land, were not joint, that is to say, they owned and collected separately nine-tenths and one-tenth share of the rents, the defendant being entitled to nine-tenths. A

fair criterion of the right of the plaintiff to recover that which he claimed in this suit is this: if the defendant had cultivated, and that cultivation had resulted in a total loss of crop, so that the defendant had been a loser, say to the extent of Rs. 500, could he have brought a suit against the co-owner, plaintiff, to recoup himself? We think the plaintiff would have been fully entitled to answer "there was no agreement and no privity between us; you undertook the cultivation at your own risk and must suffer the consequences." We think, therefore, that the defendant having cultivated the land with the acquiescence of the plaintiff, who stood by and offered no objection, is only bound to pay the plaintiff his proper share of the rent. We have no means of ascertaining what the rent should be. We apprehend the case must go back to the Lower Appellate Court in order to fix the rent due on the land, and the plaintiff will be entitled to one-tenth of that rent.

The costs of this appeal will abide the result. This order will govern special appeal No. 440.

The 8th August 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Joint Hindoo Family—Onus Probandi.

Case No. 1642 of 1872.

Special Appeal from a decision passed by the Deputy Commissioner of Kamroop, dated the 21st June 1872, affirming a decision of the Sudder Moonsiff of that district, dated the 11th October 1871.

Nuronath Doss Roy and others (Defendants) *Appellants*,

versus

Goda Kolita (Plaintiff) *Respondent*.

Baboo Nullit Chunder Sen for Appellants.

Baboo Obhoy Churn Bose for Respondent.

In a suit for possession of land in virtue of a pottah issued by the eldest member of a joint Hindoo family,

where the other members dispute the claim on the ground that the lessor as one of a joint family could not give title to the whole of the land, the onus of proving the eldest brother's right to give such title is on plaintiff.

Couch, C.J.—THE plaintiff claims possession of the land, the subject of the suit, on the ground that he had purchased it from Dusrut.

The defendants dispute his right to the land on the ground that Dusrut was one of a joint Hindoo family, and that he could not give to the plaintiff a title to the whole of the land.

The Deputy Commissioner shows by his judgment that the pottah for this land was formerly in the name of Dusrut's father, Jhoporoo; that Dusrut had a brother; and that after Jhoporoo's death, a pottah was issued in the name of Dusrut, but that he was the eldest member of the family; and the Deputy Commissioner held that the defendants ought to have given evidence of his being in possession jointly with the other members of the family, and of his possession not being a separate possession on his own account.

It does not appear to have been disputed that, when Dusrut sold to the plaintiff, the family was a joint Hindoo family; but whether it was disputed or not, it has been long settled that the primary state of every Hindoo family is that of a joint family. It is so stated in *Strange's Hindoo Law*, page 225, and without alluding to any intermediate decisions, it has been said so most emphatically by the Judicial Committee of the Privy Council in *XII Moore's Indian Appeals*, page 540.* Their Lordships say there that "the normal state of every Hindoo family is joint. Presumably every such family is joint in food, worship, and estate. In the absence of proof of division, such is the legal presumption, but the members of a family may sever in all or any of these things." We must, therefore, consider that this was a joint family.

Then, according to several authorities, the pottah being in the name of Dusrut raises no presumption that the property was not the property of the family. There is a case in *Marshall's Reports*, the head-note of which is:—"In a Hindoo undivided family, the mere fact that one brother's name was used in documents relating to property affords no presumption of his being sole proprietor,

"especially where he is the eldest brother, or "is shown to be the managing member of "the family." Dusrut is said by the Deputy Commissioner to have been apparently the eldest member of the family at that time. The note we have read is correct, and the words are taken from the judgment.

In another case which is in the second volume of the *Indian Jurist*, page 261, in the judgment of the Judicial Committee of the Privy Council, the same law is laid down; and in a decision of this Court in the *VI Weekly Reporter*, page 70, where the question was whether the property in dispute was the self-acquired property of the plaintiff, one of three brothers, or the joint property of himself and his two brothers, the Principal *Sudder Ameen* had thrown upon the plaintiff the onus of showing that the property was self-acquired, and the Judge in appeal had reversed that decree; and this Court in its judgment says:—"The Judge has thrown the onus upon the wrong party. It is not denied that the three brothers were joint in food and estate. The defendant must, therefore, strictly prove that the estate which he purchased was acquired by Beharee. The Judge deals in assumptions; to wit, that because Beharee was a mookhtar, he must have made much money and acquired property separately, forgetting that it is difficult to realize a correct notion of a joint Hindoo family unless it is supposed that the members bring their earnings into the common stock.

"There has been no evidence of separation, and the mere fact of property standing in the name of one of the members of a joint family alone is no index whatever of the real owner. Neither is the existence of separate possession any evidence of separate acquisition unless it be shown that the shareholder exercising his possession separately was permitted by the consent of the other sharers to open and keep a separate account of his own, and not to carry his earnings to the common stock." Then the learned Judges say:—"This is in conformity to repeated rulings of our Court and of the late *Sudder Court*."

The case must therefore go back. Upon the authorities, it is clear that the Deputy Commissioner has thrown the onus upon the wrong party. As the case stood, it was not for the defendants to give the evidence which he required them to give. The decree must be reversed, and the suit must be remanded for re-trial.

* 12 W. R., P. C., 21.

The 8th August 1873.

Present:

The Hon'ble Dwarkanath Mitter, *Judge.*

Ijmalee Lands—Khas Possession—Boundaries.

Case No. 372 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Chittagong, dated the 16th July 1872, reversing a decision of the Moonsiff of that district, dated the 4th March 1872.

Kalee Kinkur and others (Defendants)
Appellants,

versus

Ishan Chunder and others (Plaintiffs)
Respondents.

Mr. R. E. Twidale for Appellants.

Baboo Bama Churn Banerjee for
Respondents.

In decreeing a suit for khas possession of a given quantity of land on the strength of an itnamee pottah, where the defendant lessor (a co-sharer) contended that the lands are ijmalee, and that the plaintiff is not entitled to obtain khas possession of any specified portion, it is incumbent upon the Court to ascertain the precise lands for which the suit was brought, and then to determine whether those lands belong exclusively to the defendant's share.

Mitter, J.—I AM of opinion that the decision of the Subordinate Judge is erroneous in law in one point only.

The plaintiff brought this suit to recover possession of 2 drones and 9 kanees of land on the strength of an itnamee pottah granted to him by the second party defendants, who, he alleged, were the proprietors of a 2 annas share of the talook within which the lands in dispute are admittedly situated. The plaintiff, however, does not give the boundaries of the 2 drones and 9 kanees of land claimed by him. He gives the boundaries of a large area of land, and after making certain deductions in favor of certain parties mentioned in the plaint, he says that the 2 drones and 9 kanees of land claimed by him in this suit are situated within those boundaries.

The defendant (special appellant) in his written statement alleged distinctly that the entire lands of the talook were joint; that there was no division or partition of the lands of any kind whatsoever; and that the plaintiff would not be entitled to obtain khas possession of the entire 2 drones and 9 kanees of land sued for by him, even if the title upon which he brought this suit were otherwise valid.

The Subordinate Judge states in the very first part of his judgment:—"Be it known that the defendant No. 2 is the proprietor and talookdar of the 2 annas share, and that the disputed land bore reference to that very 2 annas land in respect of, which the defendant No. 1 makes no denial." Now, this statement of the Subordinate Judge is clearly erroneous. The contention of the defendant Kalee Kinkur has throughout been that the lands of the talook were ijmalee, and that the plaintiff was not entitled to obtain khas possession of any specific lands whatever. Under these circumstances, before giving a decree to the plaintiff, it was incumbent upon the Subordinate Judge to ascertain the precise lands for which this suit was brought, and then to determine whether those lands appertained exclusively to the 2 annas share which admittedly belongs to the second party defendants. The decree of the Subordinate Judge as it stands at present appears to me to be on the face of it incapable of execution. The lands decreed have not been specifically defined. The plaintiff gives the boundaries of a much larger area of land, to the greater portion of which neither he nor his lessors have any right whatever; and it is impossible to say what difficulties will arise when such a decree will be sought to be executed. The finding of the Subordinate Judge, however, on the title set up by the defendants must stand, so far as the 2 annas share of the second party defendants is concerned. But the case will be remanded to that officer for the purpose of defining the lands claimed by the plaintiff, as also for determining whether those lands belong exclusively to the 2 annas share covered by the itnamee lease set up by him.

I think that under the circumstances of this case, as the appellant has succeeded only as to a part of his appeal, each party ought to bear his own costs.

The case is remanded to the Lower Appellate Court.

The 8th August 1873.

Present :

The Hon'ble Dwarakanath Mitter, *Judge.*

Act VIII of 1859, s. 246—Evidence.

Case No. 605 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 6th August 1872, reversing a decision of the Moonsiff of that district, dated the 12th July 1871.

Gooroo Doss Roy (Defendant) *Appellant,*

versus

Sona Monee Dossia (Plaintiff) *Respondent.*

Mr. R. T. Allan and Baboos Ashootosh Dhur and Bhowanee Churn Dutt for the Appellant.

Baboo Bungsee Dhur Sen for Respondent.

A claim under Act VIII of 1859, s. 246, rejected because the evidence produced was unworthy of credit, is in the same footing as if claimant had failed to produce any evidence, and the order rejecting it is one on the merits and not on default.

Mitter, J.—In this case, it seems to me quite clear that the Subordinate Judge is wrong in overruling the plea of limitation. It has been held by a Full Bench of this Court that in cases of claims preferred under Section 246 it is for the claimant to make out a *prima facie* case.*

The plaintiff in this case preferred a claim under that section, but it was rejected on the ground that he had failed to produce any evidence in support of it. It has been argued that this was not an order upon the merits of the claim, but an order made on default.

This contention seems to me to be clearly erroneous. I see no reason whatever for drawing any distinction between a case in which the claimant produces evidence which is rejected as unworthy of credit, and a case in which he altogether fails to produce any evidence in support of his claim.

The decision quoted by the Lower Appellate Court appears to me to be wholly inapplicable to the circumstances of the present case. In that case, the Moonsiff who was executing the decree without making any enquiry whatever as to the truth or otherwise of the claim put forward by the claimant, released the property from attachment upon the ground that it was impossible to make out "what particular portion of the attached

property is claimed by the claimant." Such an order was clearly not an order passed under the provisions of Section 246. The present case, however, stands on a quite different footing. In this case, the claim of the plaintiff was rejected upon the ground that he had failed to substantiate it by evidence.

The judgment of the Lower Appellate Court is therefore reversed, and that of the Court of first instance affirmed with costs of this and of the lower Appellate Court.

The 9th August 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble F. A. Glover, *Judge.*

Odihakaree of the Difloo Sastur—Declaratory Decree—Cause of Action—Judgments as Evidence—Act I of 1872 s. 13.

Case No. 1773 of 1872.

Special Appeal from a decision passed by the Deputy Commissioner and Subordinate Judge of Nowgong, dated the 30th September 1872, affirming a decision of the Moonsiff of that district, dated the 29th June 1872.

Koondo Nath Surma Gossamee (Defendant) *Appellant,*

versus

Dheer Chunder Surma Odhikar Gossamee (Plaintiff) *Respondent.*

Baboo Sreenath Doss for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

In a suit for declaration or confirmation of plaintiff's title to the office of odhikaree of the Difloo Sastur alleged to be situated at Nowgong, where defendant in his written statement claimed to be the odhikaree, and alleged that the headship was situated elsewhere, the defendant was held to be asserting a title adverse to plaintiff sufficient to justify a declaratory decree.

Held that in determining the right to the odhikaree and the custom or rule of succession to the office, previous judgments or decrees involving instances in which the right and custom in question had been successfully asserted, were admissible as evidence under the provisions of Act I of 1872 s. 13.

Couch, C.J.—The suit was brought for a declaration or confirmation of the title of the plaintiff to the office of odhikaree of the Difloo Sastur, and for damages sustained by

* 11 W. R., F. B., 8.
† 16 W. R., 22.

the plaintiff by reason of the defendant having disturbed him in the possession of the office.

The seat of this office was at Nowgong, and the rights and duties appear to be such that we think it must be considered for the purpose of a suit for confirming or declaring the title to it as immoveable property. If not strictly immoveable property, it is so much of the nature of immoveable property that the Court within whose district the chief seat of the office is, should have jurisdiction to entertain the suit for the purpose of determining the title to it. Then the question is, whether there was a cause of action to justify the decree that has been made by the Lower Courts, a decree declaring the title of the plaintiff to the office, and giving to him merely one rupee damages.

There appears to be no evidence, except hearsay that the defendant came to Nowgong, or endeavoured to collect any tribute, as it may be called, within the district; but the defendant's written statement shows that he asserted a title to the office. The written statement is evidence against him that he was claiming the office, and was disputing the title of the plaintiff to it. The defendant seems to have asserted that the headship of the odhikaree, which the plaintiff alleged to be situated at Nowgong, was situate elsewhere, and that he was in reality the odhikaree of the Difloo Sastur. We think there is evidence that he was asserting a title adverse to the plaintiff, and that the Court had before it materials on which it was justified in pronouncing a decree declaring the title of the plaintiff.

As to the award of one rupee as nominal damages, it may be a question whether the Court was right in awarding any damages. But it has not been made a ground of objection in the special appeal, and seeing that the costs of the suit are only awarded in proportion to the one rupee damages, it is not a matter of any consequence.

Another objection which has been taken is that the Lower Courts have made an improper use of certain judgments or decrees which are mentioned in the judgment of the first Court. The Deputy Commissioner appears to adopt the judgment of the Moonsiff, and he says, upon this part of the case:—"The previous decisions and judgments of other Courts as quoted by the Moonsiff all tend to confirm the plaintiff's right and title to the odhikareeship, and it appears to me the plaintiff succeeded to the title in the usual legitimate recognized

"manner according to the customs in vogue." He makes no allusion to the oral evidence, but he had previously said:—"I consider the Moonsiff was fully justified on the oral and documentary evidence adduced in determining the suit in the respondent's favor;" from which we think that, although he did not in the passage we have quoted allude to the oral evidence, he considered that, as well as the documentary.

In order to see more precisely the value of the oral and documentary evidence, we must look at the judgment of the Moonsiff. In that the Moonsiff uses the previous decrees for two purposes. Upon the issue whether the claim was barred by the law of limitation, he says:—"Besides the oral evidence adduced by the plaintiff, the judgment of Major John Butler, Assistant Commissioner of Nowgong, dated the 12th of February 1857," and then states the different judgments and says:—"Prove to the Court's satisfaction that Koosho Chunder Gossamee was the last odhikar of the Difloo Sastur, and that, on his death the plaintiff succeeded him to the odhikarship." Here he evidently uses the judgments as subsidiary to the oral evidence, and does not found his decision solely upon them. He says, besides the oral evidence there are the judgments which prove what I say.

He makes use of them again upon the other part of the case, what he calls the merits of the case. He says:—"The evidence in the record proves to the Court's satisfaction that the law governing succession to the odhikarship of the Difloo Sastur is called 'Jaistano-krama,' or the 'law of the elder.' That this is the law of the Sastur, will appear from the judgment in suit No. 1 of 1856 of the Court of the Assistant Commissioner of Nowgong, dated the 12th of February 1857, confirmed in appeal on the 5th of June 1857, and in suit No. 630 of 1869 of the Court of the Moonsiff of Nowgong, dated the 28th of December 1869. Judgments like these being analogous to judgments *in rem* are evidence against the whole world, and may be received as evidence in the present suit. Besides, there is oral evidence in the record sufficient to corroborate these judgments." We do not understand that he used the word "corroborate" in its strict sense, but he considered that there was oral evidence in the record sufficient to prove the law of succession; and it appears that there is a body of evidence showing that the law of succession was as the plaintiff contended for, and there

is also the oral evidence of Koosho Chunder Gossamee being the odhikar before the plaintiff, and of the plaintiff subsequently being in exercise of the office. Therefore, supposing these judgments were not admissible for any purpose, there appears to be sufficient evidence to support the decisions of the Lower Courts without them, and that is an answer to the objection that they have been improperly admitted.

But we think the judgments were not improperly used. Upon the first question as to possession of the office, they showed that the person named in them was successfully asserting a right to the possession; and upon the other question of the custom or rule of succession, they showed instances in which the custom alleged had been successfully asserted. The Judge is not right when he speaks of them as being analogous to judgments which are evidence against the whole world, if he used the words in the sense of their being evidence of title against the whole world. He would be right if he treated these judgments in the way we have mentioned. But any misapprehension of this kind on his part on this point cannot, with the evidence there is in the case, be made a ground for reversing his decision.

This case is governed by what was the law before the passing of the Evidence Act. Or it may perhaps be a nice question which law was applicable to it, as it was heard by the Moonsiff when the old law was in force; and in appeal after the new law took effect. But we do not think it makes any difference. Substantially, the new law on this matter is the same as the old. Section 43 of Act I of 1872 provides that judgments, orders, or decrees, other than those mentioned in Sections 40, 41, and 42, which do not apply in this case are irrelevant, unless the existence of such judgment, order, or decree, is a fact in issue, or is relevant under some other provision of the Act. Were these judgments relevant under any provision of the Act? We think they were, under Section 13, which provides that where the question is as to the existence of any right or custom, the following facts are relevant:—

(a): Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.

(b). Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted, or departed from.

Here the right to the odhikaree was in

question, the custom or law of succession was in question, and these decrees showed instances in which the right had been asserted and claimed. They were also instances where the custom had been claimed, and the exercise of it had been asserted. We think they were admissible under the provisions of Section 13 of the Evidence Act. They were some evidence of an enjoyment or possession of the office according to the title asserted by the plaintiff. Therefore, there is no ground, we think, for this special appeal. It must be dismissed with costs.

The 9th August 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Eviction—Damages—Abatement of Rent—Limitation—Act VIII (B.C.) of 1869 s. 27—Estoppel.

Case No. 1555 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 15th August 1872, affirming a decision of the Moonsiff of Burjorah, dated the 29th June 1872.

F. Aitchison and others (Plaintiffs)
Appellants,

versus

Rajah Nil Monee Singh Deo Bahadoor
(Defendant) *Respondent.*

The Officiating Advocate-General for Appellants.

Mr. R. T. Allan for Respondent.

In a suit by tenants for abatement of rent in consequence of having been dispossessed of two monzabs which were included in their lease, and for which separate rents were fixed, the landlord pleaded limitation:

Held that Act VIII (B.C.) of 1869 s. 27 did not apply to a case of this description.

Held that in such a case the eviction might either give the tenant a cause of action for damages, or suspend the rent during the time it lasts. In the latter case the cause of action would not arise until the landlord sought or threatened to recover rent.

How that the fact of past payments having been made did not conclude the tenants from saying that the landlord had no right to recover future rent.

Couch, C.J.—THE plaintiffs in this suit, the Bengal Coal Company, were the tenants of the defendant of a talook, and their claim is in consequence of their having been dispossessed of two mouzahs which were included in their lease by virtue of decrees obtained against the defendant, the lessor, one being dated the 1st of February 1862, and the other the 24th of June 1863. They were obtained against him by persons having a title to the two mouzahs, and the plaintiffs have been evicted by a person having a superior title to their lessor.

Ordinarily, the consequence of an eviction even from part of the demised property, would at law, if not in a Court of equity, be a suspension of the entire rent. But in this case separate rents were fixed for each mouzah, and the parties themselves afforded the means of apportioning the rent according to the property of which the lessees have been dispossessed. The plaintiffs in their suit ask for no more than an abatement of the rent which was fixed in respect of the two mouzahs. Even if they had asked for more, that would be an equitable way of treating the case which has arisen.

It was objected that the suit was barred by the law of limitation. The Judge, who dismissed the appeal and affirmed the judgment of the Moonsiff, held that it was, apparently applying to it Section 27 of Act VIII B.C. of 1869.

That Section does not appear to us to apply to a case of this description. The 19th Section of that Act makes a provision for abatement of rent in certain cases and allowed suits to be instituted for it. We think there is no ground for saying that the Section which follows, giving a period of limitation for suits for abatement of rent, is intended to apply to other suits than those mentioned in the Act. If we were to hold otherwise, the effect would be that this Act passed by the Bengal Council would alter the general law of limitation in Act XIV of 1859.

Then we have to consider whether the suit was barred by Act XIV of 1859; and it was contended that the cause of action arose, if not at the time the decrees were made, certainly when they were executed and the plaintiffs turned out of possession of the two mouzahs.

We must consider what is the cause of action in such a case as this. The eviction of the tenant operates in two ways. It gives him at once a cause of action for any damages which he may sustain by being turned out of the land; and he may sustain considerable damages by this, even although he should be relieved from the payment of rent. Many cases might be supposed in which the damage would be considerable. His cause of action in respect of those damages would arise at the time he was evicted; and if he did not bring a suit within the period allowed by law, it would be barred.

But the eviction operates in another way; it suspends the rent during the time it lasts. It is an answer to any demand which the landlord may make for the rent, and may be set up by way of defence to any suit which may be brought to enforce the payment. But until the landlord seeks to recover the rent, there is not a cause of action. As the rent becomes payable from time to time, the cause of action which the tenant has is this; if the landlord, availing himself of the power which the Regulation gives him to recover the rent, takes steps to do it, or even threatens to do it, the tenant may come to the Court and ask to have it declared that the landlord is not entitled to recover his rent and to have him restrained from taking proceedings to do so. It is then that in respect of the rent which is suspended, and which the landlord is seeking unlawfully to recover, a cause of action arises. So the cause of action in respect of which the present suit is brought, arose within the period of limitation allowed by law. The plaintiffs have for some years been paying the rent which they now seek to have it declared they are not liable to pay. They must lose all the payments which they have made, and cannot recover them back. But their having made those payments does not conclude them from saying now that the landlord has no right to recover future rent, and, if he is about to take steps to do so, coming to this Court and seeking to prevent it.

We think, therefore, that the decision of the Lower Courts is wrong, and that the plaintiffs are entitled to a declaration that they are not liable in future to pay the rent which was fixed for the two mouzahs from which they have been evicted. They are entitled, if necessary, to an order from this Court restraining the defendant from taking any proceedings to recover the rent. The appellant must have the costs of this appeal.

The 11th August 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble J. B. Phear, Judge.

Small Cause Court, Calcutta—Reference—Non-appearance.

Reference to the High Court under Section 7 Act XXVI of 1864 by the First Judge of the Court of Small Causes at Calcutta.

Williamson Brothers (Plaintiffs)

versus

Arab Ismail Bham (Defendant).

Mr. A. Phillips for the Plaintiffs.

No one for the Defendant.

Where a party to the suit requests the reservation of a question by the Small Cause Court for the opinion of the High Court, and it is not reserved because the Judges entertain any doubts, if he does not appear in the High Court the decision must be given against him, whether security has been given for the costs of the reference and the amount of the judgment or not.

It appeared from the case which was stated by the Judge of the Small Cause Court that he "gave judgment for the plaintiff" in this case "contingent on the opinion of the Hon'ble the Judges" on certain points "which" he added, "it has been demanded by the defendant that I should refer."

On the case being called on before the High Court, the defendant was not represented. Without hearing Mr. Phillips for the plaintiffs, who appeared in support of the judgment which had been pronounced by the Judge of the Small Cause Court, the Chief Justice delivered judgment as follows :—

We are of opinion that where a party to the suit requests the reservation of a question by the Small Cause Court for the opinion of this Court, and it is not reserved because the Judges entertain any doubts, if he does not appear in this Court, the decision must be given against him whether security has been given for the costs of the reference and the amount of the judgment or not.

The Court is not bound to act as Counsel for him. The judgment in this case will be for the plaintiffs with an order for the costs of reserving the case for the opinion of this Court in the same terms as in the case of *Dissent v. The Justices of the Peace for*

the Town of Calcutta, viz., the costs of reserving the question and stating it for the opinion of this Court, and otherwise arising thereout or connected therewith.*

The 12th August 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Rights of Heirs—Mahomedan Law—Small Cause Courts—Jurisdiction.

Reference to the High Court by the Judge of the Small Cause Court at Burrisal, dated the 5th May 1873.

Shaikh Koreem Bux, *Plaintiff,*

versus

Nomeero and others, *Defendants.*

The seven heirs of a deceased Mahomedan, under an agreement among themselves, took equal shares of 14 annas of his estate, and allotted 2 annas to *rehalallah*, i.e., devoted the profits to charitable purposes under the management of one of their number. On the death of such manager, three of the heirs sued his tenant for a proportion of rent equal to their shares, and three-sevenths on account of *rehalallah*. The remaining heirs opposed the claim in regard to *rehalallah* which they said plaintiffs had no right to collect, and which could only be collected by the mutwallee appointed by the deceased manager, urging that if the Court did not admit the

* The 27th May 1870.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble W. Markby, Judge.

Reference to the High Court by the First Judge of the Small Cause Court at Calcutta.

F. Dissent (Plaintiff)

versus

The Justices of the Peace for the Town of Calcutta (Defendants).

No one for the Plaintiff.

Mr. C. J. Wilkinson for the Defendants.

Judgment of the High Court :—

Couch, C. J.—We think that in this case, as the plaintiff does not appear, and the case was reserved upon the application of the plaintiff, and not by the Court on account of a doubt which the Court entertained, we may give judgment for the defendants, judgment having been given for them in the Court below. We also make an order under Section 8 of Act XXVI of 1864 for costs. If a party asks the Judge of the Small Cause Court to refer a case, and does not appear in this Court, he must be taken to have abandoned his case, and must have judgment given against him in this Court. Judgment will be entered for the defendants, and the plaintiff must pay the costs of reserving the question and stating it for the opinion of this Court, and otherwise arising thereout or connected therewith.

appointment of the mutwullee, it would have to decide whether collections should be made by the heirs in equal shares or in shares allowed by the Mahomedan law:

Held that the suit ought not to be entertained by the Court of Small Causes.

Case.—I HAVE the honor, under Section 22 Act XI of 1865, to submit the following for the opinion of the Hon'ble Court:

I beg respectfully to state that one Muzzofur Dhakal died, leaving seven heirs, viz., three wives, one mother, two brothers, and one uncle. Their shares in the property left by the deceased, though not equal under the Mahomedan law, but under an agreement entered into by themselves, they succeeded to the 14 annas of it at 2 annas each. The remaining 2 annas they allotted for *rehalallah* or "way to God," and left the management of it under a stipulation in the said agreement with one of them, Poornimah, mother of the deceased, who alone was empowered to distribute the profits of these 2 annas in charitable purposes, &c. Poornimah is now dead, and three of the heirs, viz., two wives and the uncle, have brought the suit

No. 335 of 1873.
Shaikh Koreem Bux and
others
versus
Nomeero and others.
For rent of house, laid
at Rs. 26-9.

noted in the margin
against a tenant to
recover house rent,
Rs. 26-9, on account
of 6 annas 17 gundas
1 cowree 4 krants
share, viz., their own

6 annas at 2 annas each under the ekrar, and 7 gundas 1 cowree 4 krants being three-sevenths of the two annas on account of *rehalallah* whose manager is dead.

The other three living heirs, who have been made co-defendants, have appeared and raised objections to the portion of the claim comprising the share of *rehalallah* which they say plaintiffs have no right to collect, and as Poornimah to whom was left the sole management of it died appointing one Moonshee Ijjutoollah as mutwullee, i.e., guardian or representative, the profits of the share allotted for *rehalallah* should be collected alone by him. They also say that, if the Court do not admit the appointment of mutwullee, and as the 2 annas allotted for *rehalallah* was reserved from the entire estate of the deceased proprietor, it shall have to decide whether the plaintiffs will be entitled to make collections of it in equal shares as claimed by them, or according to shares allowed by the Mahomedan law, —which it has no power to try under the exceptional Clause 2 Section 6 Act XI of 1865.

The principal defendants who are the tenants have appeared and urged payment long before the institution of the suit to the mutwullee Moonshee Ijjutoollah as regards the portion claimed on account of the share of *rehalallah*.

The mutwullee also has appeared and prayed that he be included among the defendants in this case under Section 73 Act VIII of 1859.

The plaintiffs urge that there is no provision in the ekrar giving authority to Poornimah to appoint a mutwullee. She was the mother of the deceased owner and the more elderly member of the family: hence by the consent of all the heirs she was elected manager of the share allotted by them for *rehalallah*. The duty that had devolved on her under the ekrar was simply to use the profits of the share to all sorts of charitable and devotional purposes, but not to make herself the collections of it which the plaintiffs and others did during her lifetime, and as there is no prohibition in the ekrar for the heirs to make the collections, the plaintiffs have also obtained decrees of such claims in the local Moonsiff's Court, where the cause of action arose within the jurisdiction of such Court. There is no stipulation in the ekrar that Poornimah will delegate her powers to a third person, and as she was appointed by the consent of all the heirs, so when all of them again feel the necessity of appointing another in her place and mutually agree to it, a proper successor may be elected in time; but when she is no longer living, they must *ad interim* collect the profits themselves according to their own shares, and use them in charitable purposes, or keep them for the present in deposit for such use according to the choice of all the heirs: for there is another condition in the ekrar that, if any of the heirs do not allow the profits of the share of *rehalallah* to be used in charitable purposes as provided in it, he will forfeit his own share, and make himself a sinner before God. Besides, it is necessary to make the collections by them to defray the expenses necessary and pay the sudder khajannah of the share. Further, as they have succeeded to the property of their deceased ancestor in equal shares by mutual consent, so they will make collections of the *rehalallah* in equal shares, and not according to the Mahomedan law.

It is true the ekrar is silent as to the point whether Poornimah is able to delegate her powers to a third person, or she can appoint a mutwullee to succeed her after her

death. There is no prohibition in the deed for the other heirs to make the collections of the share allotted for *rehalallah*, the profits of which alone Poonimah, was authorized to distribute in charitable and other purposes for the benefit of the soul of the deceased proprietor. There is also another stipulation in the ekrar that any one of the heirs who fails to cause the profits of *rehalallah* to be devoted to charitable purposes, &c., will not only make himself a sinner before God, but also forfeit his own share in the property of the deceased. It is, however, necessary that the profits should be realized in order to preserve the share by defraying all its necessary expenses and paying the sudder khajannah, but the question is who should be allowed to realize them? Whether the mutwallee or the heirs themselves? If by the latter, the question also arises whether the heirs must make the collections in equal shares, or in proportion to their respective shares allowed by the Mahomedan law? They have not succeeded to the property under any will made by the deceased proprietor while living, but by an ekrar executed by themselves after the decease of their ancestor in which they have consented to take equal shares in the 14 annas of the property left by the deceased, and leave the remaining 2 annas to be appropriated to purposes which will secure blessings for the soul of the deceased owner. For this purpose they had appointed the mother of the deceased, an elderly member of the family, as the fit person able to better use the profits to purposes most conducive for the benefit of the soul of their ancestor, and as she is dead and they did not give her authority to appoint a successor or mutwallee whom they do not admit, and the collections on account of the share have consequently stopped, the plaintiffs who are three of the heirs of the deceased have applied to recover house rent from a tenant to the extent of their own and three-seventh part of the 2 annas share of *rehalallah*. Hence I do not consider this claim as falling under the exceptional Clause 2 Section 6 Act XI of 1865. Plaintiff's pleader cites the Full Bench ruling noted in the margin in which it has been ruled that "the Small Cause Courts have jurisdiction to try questions of title which incidentally arise in suits cognizable by them;" and says that, as the

present suit is to recover house rent which under Section 6 Act XI of 1865 this Court is authorized to try, it can also enquire into all the points which have incidentally arisen in this case as stated before. But as I am doubtful whether the precedent quoted by the plaintiff's pleader will govern this case also, I have most respectfully taken the liberty to ask the opinion of the Hon'ble Court whether I am competent to try this case of house rent under all the circumstances stated above; as in disposing of this case, I shall also have to enquire into the rights of the mutwallee to receive payment of rent from the tenant, or decide whether the collections on account of the portion allotted for *rehalallah* shall be made by the heirs in equal shares, or according to the shares allowed by the Mahomedan law, for the 2 annas allotted for *rehalallah* is no longer the property of any earthly being.

Judgment of the High Court:—

Jackson, J.—We think this suit ought not to be entertained in the Court of Small Causes.

The 12th August 1873.

Present:

The Hon'ble F. A. Glover and G. G. Morris,
Judges.

Full Bench Rulings.

Case No. 182 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Tirhoot, dated the 21st February 1873, affirming an order of the Subordinate Judge of that district, dated the 23rd September 1872.

Jugroopa Chowdhrair (Decree-holder)
Appellant,

versus

Bunwaree Tewaree and another (two of the
Judgment-debtors) *Respondents.*

Baboo Jadub Chunder Seal for Appellant.

Moonshee Serajool Islam for Respondents.

A Full Bench ruling, as it makes no new law but merely expounds what the law is, must have retrospective as well as prospective effect.

Glover, J.—The special appellant before us is the decree-holder. He obtained a decree

26th August 1863.

Rughoo Ram Biswas

versus

Ram Chunder Dobey
and others.

(Suth. S. C. Ct. Refer., 51).

- in the Lower Court on the 29th March 1865, which was finally confirmed by this Court on the 11th September 1866. First execution was taken out on the 4th October 1869, and since that time three other processes of execution have been taken out, all of which were in turn struck off consequent on no proceedings being taken by the decree-holder. The question before us, however, is whether the original execution of the 4th October 1869 was or was not barred by reason of more than three years having elapsed between that date and the date of the High Court decision of the 11th September 1866. The appellant contends that, at the time when the High Court's decree was passed, the law on the subject was that execution under such decrees might be taken out at any time within twelve years, and that this rule obtained until the Full Bench decision (XVI Weekly Reporter, Full Bench Rulings, page 1), was passed on the 12th June 1871. It is argued that this decision ought not to have retrospective effect, or take away from a decree-holder the privilege which many other previous decisions were supposed to have given him. Now the Full Bench decision made no new law: it merely expounded what the law was, and laid down the procedure which ought to have been followed previously: it must, therefore, have retrospective as well as prospective effect. If, therefore, on the occasion when the first execution was taken out, the decree-holder had suffered his decree to be barred by lapse of time, all the decisions which were given before that date and which were in favor of twelve years' limitation could not be of any benefit to him, inasmuch as decrees of the High Court are governed not by the twelve years' limitation, but by three years' limitation prescribed by Section 20 Act XIV of 1859. The Judge was right in his interpretation of the law that the decree-holder was barred when he took out the first execution in 1869. It makes no difference that the judgment-debtor has allowed three other execution processes to be taken out since without objection, inasmuch as a decree once barred is always barred. This point has been ruled many times by this Court. The appeal is dismissed with costs, sixteen rupees being allowed for pleader's fees.

The 13th August 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Estoppel—Benamiee Koooleuts—Mahomedan Law—Marriage—Legitimacy.

Case No. 1707 of 1872.

Special Appeal from a decision passed by the Judge of Bhangulpore, dated the 16th November 1871, remanding the case to the first Subordinate Judge for re-trial, and also against the decree of the Judge of Bhangulpore, dated the 19th June 1872, affirming a decision of the first Subordinate Judge of that district, dated the 6th March 1872.

Kedarnath Chuckerbúty (Plaintiff)
Appellant,

versus

Mrs. Benjamin Donzelle (Defendant)
Respondent.

Messrs. J. W. Montrion and M. L. Sandel, Baboo Chunder Madhub Ghose, and Moonshee Mahomed Yusoof for Appellant.

The Advocate-General, and Messrs. J. T. Woodroffe, M. P. Gasper, and C. Gregory, and Baboo Omernath Bose for Respondent.

Held that it would be very inequitable that there should be anything in this country of the nature of the old English doctrine of estoppel by deed. A party giving a koooleut nominally in favor of A, is not estopped from pleading that he did not contract with A at all, and that he did not obtain the leased premises from her, but that she knew nothing of the transaction, her name being used merely as a matter of convenience between the lessee and her husband.

The acknowledgment of a wife which the Mahomedan law requires as proof of marriage should be specific and definite. The mere fact of a man keeping a woman within the purdah, and treating her to outward semblance as a wife, does not necessarily in the absence of express declaration and acknowledgment constitute the *factum* of marriage.

In order to an acknowledgment of paternity legitimizing children under the Mahomedan law, the declaration ought to be clear and distinct in respect to each child; and the children, or those of them who have reached years of discretion, ought to come forward and acknowledge their father.

Phear, J.—THE cause of action upon which the present suit is brought is thus stated by the Subordinate Judge, before whom the first trial took place in February 1870:—

"Plaintiffs, as putneedars of Mussamut "Bibee Aneesul Burkut, sue to recover

"Rs. 1,011 principal and interest, being arrears of rent due by the defendant for the Aghra lease of 1278, on a kubooleut, dated the 1st of May 1860, executed by one of the managers of Toolshia concern in favor of Mussamut Aneesul Burkut."

"The defendant does not deny the execution of the kubooleut relied upon by the plaintiff, but contends that, although the kubooleut was executed in favor of Aneesul Burkut, but the real ownership of the mehal leased was with her husband, to whom rent was paid as long as he lived, and on his death, the same was remitted to his eldest wife Aneesul Burkut not as malik, but as the head of the family, and appropriated by all his heirs, and that as in November last, defendant has obtained putnee pottahs of fifteen-sixteenth share of the 7 annas of the Talook Gungapur Rajnee from the heirs of Golam Hossein, the late proprietor (excepting Aneesul Burkut), so plaintiff can at least have rent for one share."

"The issues for trial in this case are:—

"1st.—Whether defendant is estopped from denying the title of her lessor, or not?"

"2nd.—Whether Aneesul Burkut was in the receipt of rent of previous years on her own account, or on her own account as well as on that of the other heirs of Golam Hossein?"

"3rd.—Whether plaintiff is entitled to receive rent from the defendant, or not?"

On the trial of the case, the Subordinate Judge was of opinion that, inasmuch as the execution of the pottah and the kubooleut was admitted by the respective parties, therefore the relation of landlord and tenant was satisfactorily established between the plaintiff's zemindar and the defendant, and that being so, the defendant was estopped from disputing Aneesul Burkut's title. On this ground he determined the suit in favor of the plaintiff.

The Subordinate Judge also found as a fact upon the evidence that Aneesul Burkut was actually the owner of the property.

On appeal preferred against this decision of the Subordinate Judge to the Judge, the Judge held that the Court ought not to look behind the kubooleut; and as the execution of that document was admitted by the defendant, he could not deny his landlord's title; and accordingly on that ground alone, the Lower Appellate Court upheld the decision of the Subordinate Judge.

The case then came up to the High Court

by way of special appeal, and it was there held that the trial in the Lower Appellate Court had been incomplete and unsatisfactory. Mr. Justice Paul pointed out very clearly that the English doctrine of estoppel had been imperfectly apprehended in the Courts below, and altogether wrongly applied. If it had been admitted or proved that the defendant was let into possession of the leased property by Aneesul Burkut, then, probably in this country, as well as in England, the principle would come into play that a man shall not, during his possession of premises leased to him, be allowed to dispute the title of the person who put him into possession. No doubt in this case the kubooleut, as being a document signed by the defendant, furnishes strong evidence against him of any material facts stated in it. But it is we think almost impossible, and certainly it would be very inequitable, that there should be anything in this country of the nature of the old English doctrine of estoppel by deed.

It was clearly open to the defendant in this case to say, as he did in fact say, although I gave a kubooleut nominally in favor of Aneesul Burkut, yet I did not contract with her at all. I did not obtain the leased premises from her; she knows nothing whatever of the transaction; her name was merely used as a matter of convenience between me and Golam Hossein. I got the subject of lease from Golam Hossein's own hands and contracted to pay rent to him in the name of Aneesul Burkut.

If the truth of these allegations were made out on the part of the defendant notwithstanding any statement which there might be in the kubooleut, there would also, no doubt, remain, in addition, the further question of fact to be enquired into, namely, whether Aneesul Burkut was or was not the real owner of the property, and Golam Hossein merely her agent in this matter, although he put himself forward to the defendant as the real owner. The Lower Appellate Court omitted to investigate any of these matters, or to enquire into any of these alleged facts, and decided the case merely in view of the admitted kubooleut. This, we entirely concur with the Judges who decided the case on the former special appeal, was erroneous, and the High Court was obliged to send back the case for trial upon its merits. After remand, for some unexplained reason the case was sent by the Judge to the first Court for the production of fresh evidence and re-trial. The parties appear to have acquiesced in this course, and

did not object to it. On a second trial, the Subordinate Judge, who was not the same Judge who tried it in the first instance, found as a fact that Aneesul Burkut's name in the pottah and the kubooleut stood for Golam Hossein; that the transaction was benamee; that Golam Hossein, and not Aneesul Burkut, was the actual owner of the property, and that it was with him that the defendant entered into a contract of tenancy, and from him he received possession of the subject of lease.

The Subordinate Judge also found that Golam Hossein, besides his first wife Aneesul Burkut, had a second wife, one Afeutoonnissa, and also children by the latter; and that, on the death of Golam Hossein, his right in the leased premises was inherited not by Aneesul Burkut alone, but by Aneesul Burkut and Afeutoonnissa and others, in the shares prescribed by the Mahomedan law,—Aneesul Burkut's share under the particular state of facts found by the Subordinate Judge being one-sixteenth of the whole. From this foundation of facts he arrived at the conclusion that the plaintiff who had taken a putnee pottah from Aneesul Burkut, was entitled to claim her one-sixteenth share, and no more, of the rent due from the defendant to the zemindar under his lease. And accordingly he gave the plaintiff a decree for that amount. Against this decree the plaintiff appealed, and the Lower Appellate Court dismissed his appeal with costs.

The case now comes before us on special appeal preferred against the decision of the Lower Appellate Court. On the foregoing statement of the facts of the case, it appears that the contest between the parties turned upon two principal questions: first, was Aneesul Burkut, at the time when the defendant executed his kubooleut, the real owner of this property or not? If not, did she, upon the death of Golam Hossein, inherit any share in that property, and if so, how much? For the defendant does not in this suit dispute that, if Aneesul Burkut inherited from her husband Golam Hossein any share or interest in this property, the plaintiff is entitled to recover from him a proportionate amount of the rent which he contracted to pay under his kubooleut.

The case has been really argued before us more as a regular appeal than a special appeal. Mr. Montriou urged upon us very forcibly that the evidence on the record did not justify the conclusions of fact at which the Lower Courts have arrived. He analysed the evidence very skilfully; and if we had

here to determine the case upon its merits, it is possible that in some respects we might take a different view of the value of parts of the evidence from that taken by the Lower Courts. But, sitting here as a Court of special appeal, are merely called upon to consider whether the trial below has been on the whole efficient and satisfactory, and whether the evidence on the record is in law sufficient to support the conclusions at which the Lower Courts have arrived; and we feel ourselves bound to say that in regard to the first and principal question which has been mentioned, there is ample evidence on the record to support the finding of the Lower Courts. It is we think quite impossible for us on special appeal to say that the Lower Courts were not in law justified in finding upon the materials before them that Golam Hossein was the real owner of this property, and that the contract of lease was made with him, and with him alone.

With regard to the second question the case is somewhat different. It will be remembered that that question is, did Aneesul Burkut, on the death of Golam Hossein, inherit this property or any share of it, and if so, what share? Now, there can be no doubt on the facts admitted by both sides that Aneesul Burkut was the wife of Golam Hossein, and therefore that, as his widow, she inherited a share of his property. But what that share amounts to depends upon whether or not there were besides herself another or other surviving widows and surviving children of the deceased.

The Lower Appellate Court, in affirming the decision of the first Court, has found as a fact that the deceased Golam Hossein left him surviving, besides Aneesul Burkut, a widow Afeutoonnissa and certain children. At the same time that it has expressed its finding of these facts, the Lower Appellate Court has said that the direct evidence of the marriage of Golam Hossein with Afeutoonnissa was entirely unworthy of credit: and the Judge placed his finding solely upon that which is, in truth, the result of inference drawn from collateral facts established as the Judge thought by the evidence. These collateral facts were supposed to be equivalent to or to manifest an admission on the part of Golam Hossein himself that Afeutoonnissa was his wife, and that certain children unnamed were his children.

After giving the best attention that we can to the evidence which has been laid before us relative to this point, we find that

in truth Enam Russool was the only witness, other than those who spoke directly to the marriage, who stated anything to the effect that Golam Hossein had acknowledged Afeutoonnissa as his wife. His testimony no doubt is deserving of some weight in this case so far as it reaches, because he appears to be a relative of Golam Hossein's, and one who by his place in the family would be injuriously affected by the existence of Afeutoonnissa's children as children of Golam Hossein. And we find in his deposition a passage, obtained on cross-examination, which, in one form of translation, suggested rather than given by the translator of this Court, would perhaps justify the inference that it was meant to convey the impression that Golam Hossein had acknowledged to the witness that Afeutoonnissa was his wife. But we observe that the Judge in dealing with this witness' evidence does not construe that evidence as going to this extent. The passage itself is vague and doubtful, and falls we think short of that which is required by Mahomedan law in the shape of an acknowledgment of a wife. In our opinion the Mahomedan law requires that an acknowledgment should be specific and definite. A statement made by one man to another person that a particular specified woman was his wife would be distinct and unmistakeable. There is nothing we think amounting to this in Enam Russool's evidence, though no doubt had the Judge below construed it as amounting to this, we should have been reluctant to say that he had committed error.

As regards the children, however, the evidence is yet more vague. There is no statement deposed to as having been made by Golam Hossein to the effect that persons in any way identified by evidence on the record were his children. He is said to have treated certain children which were on one occasion or more seen running about his house as his own, but no one ventures to identify those children with the children of Afeutoonnissa or with any known person.

Again, another requirement of Mahomedan law in the matter of legitimation is here certainly wanting, inasmuch as these children themselves, who must be old enough to do so, do not come forward and acknowledge on their part that they were children of Golam Hossein. In short, there is, in our judgment, an entire want of evidence bearing on this part of the question, *i.e.*, evidence of such a specific character as could

properly serve to support the finding which the Lower Appellate Court has come to. The result is that we think the Lower Appellate Court has erred in law by determining on the evidence upon which it relied that Afeutoonnissa was the wife of Golam Hossein, and other persons unnamed were the children of Golam Hossein. It follows that, as the case stands before us, Aneesul Burkut alone is proved to have been the wife of Golam Hossein, and as his sole widow is by Mahomedan law entitled to one-fourth share in the deceased's property. The plaintiff has not shown to us that she is entitled to more than this, and consequently we think that, while the decree of the Lower Appellate Court must be modified in favor of the appellant, it must be limited to that amount. In other words, the plaintiff, as Aneesul Burkut's putneedar, will be entitled to a decree for one-fourth of the rent reserved under the lease.

The appellant will have his costs in this suit.

Morris, J.—I concur. Although there is ground for the contention that the instrument of *hiba-bil-ewuz* is not of the nature of a deed of gift, but rather of a contract of sale, and, possession under it is not required to complete its validity, yet there seems no reason to doubt that the *hiba-bil-ewuz* of May 11th, 1855, executed by Golam Hossein in favor of his wife Aneesul Burkut, represents a fictitious and nominal, and not a real, transaction. It was intended to provide for a contingency which seemed at the moment imminent and fraught with danger to the estate of Golam Hossein, but which eventually never arose. Both the Lower Courts have taken this view of the transaction, and as there is ample evidence in the record to support it, I think that this is a finding with which on special appeal we cannot interfere.

Next as to the existence of a co-wife and children by her.

The first Court did not discuss the evidence relative to the marriage of Golam Hossein with Afeutoonnissa, or to the legitimacy of the children of whom she represents him to be the father. It states briefly that "Afeutoonnissa and others, the second wife" and some children of Golam Hossein, are "forthcoming, whose legal marriage and the fact of the children being the legitimate children of Golam Hossein are fully

"established by the depositions of the 'witnesses for the defendant.' The Lower Appellate Court, however, is far from taking this view of the evidence on this point. It 'rejects as *totally false* the whole evidence which is brought to prove directly Afeutoonnissa's marriage,' but finds that the presumption of marriage and legitimacy in favor of Afeutoonnissa and her children arises from a consideration of 'other facts.' These facts have reference to the treatment of Afeutoonnissa and her children by Golam Hossein. Now, by Mahomedan law (see Baillie, edition of 1855, page 389), 'paternity may be established by the word of 'the father himself, or by a legally constituted relative between him and the mother 'of the child' (firash). In the present case, the direct evidence of marriage is untrustworthy, and there is no proof of a declaration and acknowledgment of marriage on the part of Golam Hossein and Afeutoonnissa respectively. The mere circumstance of a man keeping a woman within the purdah, and treating her to outward semblance as a wife, does not necessarily, in the absence of express declaration and acknowledgment, constitute the *factum* of marriage according to Mahomedan law. And although an acknowledgment that they are his children may legitimate the children, yet here it cannot be said that there is legal evidence of such acknowledgment on the part of Golam Hossein. The Lower Appellate Court has no distinct finding on this head. It relies apparently on the evidence of two witnesses, Enam Russool and Mihnatul Huq. In respect to Enam Russool, it says that 'his deposition goes far to show that Golam Hossein looked on all those children' (of whom by the way Enam Russool makes no specification) 'as his legitimate offspring.' This witness deposes:—'I heard but did not see that Golam Hossein married Afeutoonnissa by 'nikah.'" About the close of his deposition, in cross-examination by the pleader of the plaintiff, he makes a statement which is somewhat obscure, but which may be understood to mean that Golam Hossein admitted before him that the son and daughter of Afeutoonnissa were his son and daughter. But this is only an indirect and not conclusive admission of marriage on the part of Golam Hossein with Afeutoonnissa, and we are left quite in the dark as to who the son and daughter are, or what their names are. The other witness, Mihnatul Huq, is equally vague. He says that once he paid Golam Hossein a visit of 15 days; that

he saw in the house two sons of his (but their names he does not give), and that there was a lady (name not given) living in the purdah, in respect to whom he did not hear from any person whether she was married or unmarried. Seeing how directly the issue of the marriage of Golam Hossein with Afeutoonnissa and the legitimacy of her children has been raised in this case, and the opportunity that the order of remand has afforded of establishing the title of Afeutoonnissa and of her children as heirs of Golam Hossein, it is surprising how weak the evidence is on her and their behalf. The direct testimony is pronounced by the Lower Appellate Court to be worthless and untrustworthy, while the indirect falls far short of meeting the requirements of the law. It is impossible to accept a mere general statement on the part of many witnesses that sons and daughters were born to Golam Hossein by Afeutoonnissa. If, as alleged, he had two daughters and three sons, the declaration of paternity by him in respect to each of them ought to be clear and distinct; and on the other hand, the children, or at any rate those of them who have reached years of discretion, ought, as required by Mahomedan law, to come forward and acknowledge Golam Hossein to be their father. In all these important particulars the case is undoubtedly defective, and proof is wanting. Moreover, the conduct of Afeutoonnissa herself in remaining silent for so many years, and not asserting a right, either on her own behalf or on behalf of her children, to a share in the estate of Golam Hossein, naturally arouses suspicion. It lends weight to the view entertained by the Subordinate Judge that Afeutoonnissa was sought out and put forward by the defendant in revenge for the refusal of Aneesul Burkut to give Mr. Donzelle the putnee. On the entire case, therefore, as laid before us, I can come to no other conclusion than that there is no legal evidence of the marriage of Golam Hossein with Afeutoonnissa, or of the legitimacy of her children. In this view upon the evidence which has been adduced on her behalf, Aneesul Burkut must be held to be the sole surviving wife of Golam Hossein, and as such entitled to a one-fourth share of his property. The result will be that plaintiff as her putneedar is entitled to receive one-fourth share of the rent under the lease granted to defendant.

The plaintiff will be entitled to his costs in this appeal.

The 13th August 1873.

Present:

The Hon'ble F. A. Glover and E. G. Birch,
Judges.

*Sub-lessees—Landlord's Right of Re-entry—
Penalty.*

Case No. 1768 of 1872.

*Special Appeal from a decision passed by
the Judge of Rungpore, dated the 15th
August 1872, affirming a decision of the
Moonsiff of that district, dated the 16th
June 1871.*

Deb Pooree Boistobee (Defendant) *Appellant,*

versus

Kenoo Singh Roy (Plaintiff) *Respondent.*

Baboo Taruck Nath Dutt for Appellant.

*Mr. R. T. Allan and Baboo Grija Sunkur
Mojoomdar for Respondent.*

Where an old lease has expired and the lessee does not choose to take a new lease which is offered, the landlord's claim to re-entry cannot be styled a penalty in the sense in which forfeiture of a lease would be upon non-performance of a contract.

Glover, J.—THIS was a suit to eject the defendant from a plot of ground which she had held on different terminable leases for the last 15 or 16 years, on the ground that her lease had expired and she had not come forward to take a further settlement as provided for in the lease. The lease expired in Assin 1276, and the condition of renewal was that Deb Pooree Kusbee should enter into a fresh lease within one week.

The defendant neglected to do this, and in fact never endeavoured to get a renewal of her lease at any time, and the plaintiff served on her a notice to quit the land. No attention being paid to this, the present suit was brought.

Both Courts below held that the defendant was bound by the terms of her lease, and must quit the plaintiff's land.

It was first contended in special appeal that the defendant had a right of occupancy and could not be evicted, but we considered it unnecessary to allow argument on this point, the law having been laid down authoritatively on many occasions.

The land is admittedly used for building purposes, and the defendant is only a sub-lessee, and under such conditions no right of occupancy could under any circumstances accrue to her.

Then it was contended that the forfeiture of the lease being in the nature of a penalty, the object of which was to secure the speedy taking of a fresh lease, a Court of Equity would not enforce it when the object could be attained without such penalty.

No doubt in cases where a heavy penalty is attached to the non-performance of a certain contract, a Court of Equity will not exact a disproportionate remedy, or make a defendant pay an enormous sum in compensation for what may be a very trifling damage to the party suing.

But this, it appears to me, is a wholly different case. The defendant entered into an agreement whereby she was to have a renewal of her lease if she chose to apply for it within a specified time. It is a fact found by the Lower Courts, and the finding cannot be disputed in special appeal that the defendant thoroughly understood the nature of the contract she was entering into, and it is moreover found that, although she had more than three months' grace given to her, instead of the seven days agreed upon, she took no steps in the matter. She paid no attention, moreover, to the notice served upon her and by which she was allowed a still further *locus penitentiae*, and steadily declined to enter into any new settlement. Her old lease had expired, and a new one was offered to her if she chose to come and take it; and if she did not so choose, I cannot see that the landlord's claim to re-entry can be styled a penalty in the sense above described.

Then it is said that the defendant has gone to considerable expense and has built a house upon the land, and it was insinuated that the house was a valuable one. There is no evidence whatever on this point, and from the terms of the lease forbidding her to build a brick-house, and the fact disclosed in the evidence that a former house of hers being burned down she had been obliged to erect a new one, is against the supposition that the house in question was anything more than the usual style of mat and thatch hut common to the country, and I may add to people of the defendant's class of life. She is called in the written statement a "kusbee" or prostitute, and would not be likely to own anything beyond a thatched hut.

The plaintiff appears to have behaved throughout in a very reasonable, and, I may add, a forbearing manner. He gave the plaintiff a long period of grace, and even then allowed her another opportunity of retaining the land and of taking a fresh lease. We have been told a great deal about

the hardship inflicted on the defendant, but I must say that I cannot see that she has any reason to complain. Her continued and determined neglect of all opportunities, and her repeated refusal, for it is nothing else, to come to the landlord and settle, has been the cause of all her difficulties. She has herself to thank that she has lost her land.

The special appeal must be dismissed with costs.

Birch, J.—I concur in thinking that the special appellant has failed to show that she is entitled to relief from the forfeiture clause in her lease. There is nothing to show that the special respondent waived the forfeiture, and there is nothing in the order of the Lower Court which would justify our interference.

The 14th August 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble J. B. Phear, *Judge*.

Cause of Action—Splitting of Claim—Promissory Notes—Bond—Instalments.

Reference to the High Court under Section 55 of Act IX of 1850 by Baboo Koonjo Lal Banerjee, one of the Judges of the Court of Small Causes at Calcutta.

H. Mackintosh, *Plaintiff*,

versus

Mr. John Gill and another, *Defendants*.

Mr. M. P. Gasper for Plaintiff.

Messrs. Banerjee and Marsden for the second Defendant.

Where a promissory note is payable by monthly instalments, it is incumbent on the plaintiff when two or more instalments are due at the time he brings his suit, to sue for them in one action, and he is not at liberty to sue separately for each instalment or for some of them.

The plaintiff in this action sued to recover the fifth instalment due on a promissory note; but it appeared that he had on the 4th October 1872 sued and recovered judgment for the fourth instalment only, when he could have sued for the entire amount of the bond which had then fallen due:

Held that the judgment which plaintiff recovered on the 4th of October was a bar to the present suit.

Reference.—THIS is an action brought by the plaintiff to recover the fifth instalment of Rs. 50, and Rs. 20 interest due on a promissory note for Rs. 400 payable by eight instalments of Rs. 50 each. At the date of the institution of the suit (11th February 1873),

the remaining instalments had also fallen due. It further appears that the plaintiff, on the 4th of October 1872, sued and recovered a judgment for the fourth instalment, when, if he had chosen or been bound to do so, he could have sued for the entire amount of the bond, which however he did not do.

The case now pending before me came on for hearing on the 18th February last, when the defendant's pleader urged the following pleas in defence, *viz.* :—

Splitting cause of action, and judgment recovered.

In reference to these pleas it was argued for the plaintiff that each individual instalment constituted a separate and distinct cause of action, and that as such he was at perfect liberty to sue for them separately or together, there being no law by which he would be bound to unite them together and sue in one action. For the defendants it was urged that all the instalments having become due, they formed one cause of action which the plaintiff could not divide and sue for in separate actions: and that the fact of his having sued for and recovered a judgment on a previous occasion upon one instalment, while the remaining instalments were also due, precluded him from suing for them again, he having by the course followed by him virtually abandoned them.

There appeared to me to be great force in the contention raised by defendant's pleader, Mr. Ross. The question, however, was one of some difficulty, and I took time to consider it and consult the law on the subject. In the meanwhile the plaintiff instituted another action for the sixth instalment, which in the usual course of the distribution of cases was placed before the third Bench, and before I could pronounce my judgment the question was again raised and argued before Mr. MacEwen, who decided it against the plaintiff, from which decision there was an application for a new trial before a Bench consisting of the first Judge and Mr. MacEwen. After argument the Judges differed in opinion, and the question was ultimately referred to the High Court for decision. I was thus obliged to postpone the case till the point was finally decided. The Honorable Court, however, in accordance with a previous ruling, has returned the reference. I have, therefore, had to dispose of the question in the case before me according to my view of the law.

I must at the outset say that I fully agree with Mr. MacEwen (a copy of whose judgment and remarks on the first Judge's reference

are herewith annexed,* in the view which he has taken of the law applicable to this case,

* *Remarks by R. S. T. MacEwen, Esq.*

The view which I take of this case is fully explained in my judgment, a copy of which is annexed. I think the promissory note must be treated as an *entire* contract for the payment of money, divisible for a time, but indivisible after the last instalment has become due. In this respect I think the case comes within the scope of Mr. Sergeant Manning's remarks, quoted at pp. 522-3 of Mr. Broom's County Court Practice,† and that as each instalment falls in a new entire contract for the total sum then due arises, *et sic toties quoties*. On one occasion the plaintiff acted on this principle, for he brought a suit for half of the first and the whole of the third instalments. The items arise out of one and the same contract, and are of the same character. They are merely separate breaches of the same contract, and in this respect they differ from items which in themselves are of a varied character, such as goods sold, work and labor and money paid, which may, but need not, be included in one *indebitatus* count. This I understand to be the distinction drawn by the Court in *Grimbly v. Aykroyd*. That being so, and the plaintiff having had a complete cause of action in respect of the whole debt in October, I do not think he was at liberty to split his cause of action "for the purpose of bringing two or more suits." I think this is the meaning of Mr. Broom's remarks, at page 56, when referring to *Grimbly v. Aykroyd*. The difficulty in this case is that the point has never, apparently, been decided, and we can only argue by analogy: but if the practice of the Courts is any indication of the correct principle, then it is altogether in favor of the view which I have taken.

I think that any other course would be deemed vexatious and harassing, and I cannot help thinking that this plaintiff's mode of proceeding is so in the highest degree. The question, upon which we differ, is one of some importance; if my learned colleague's contention be correct, the practice which has always prevailed in this Court, in instituting suits of this kind, may be altered, and any alteration would in my opinion be undesirable. I would therefore propose to refer the question for the opinion of the Honorable the Judges of the High Court, under Section 55 of Act IX of 1850, and in the meantime make the rule absolute contingent upon that opinion.

Judgment of R. S. T. MacEwen, Esq.

"The defendants gave a bond to the plaintiff for Rs. 400, dated 4th September 1871, payable by monthly instalments of Rs. 50. Portions of the early instalments were paid, but default being made in others, plaintiff brought suits to recover them. The last instalment fell due on the 4th May 1872. At that time five instalments were due. The plaintiff waited for five months, and then, instead of suing for the whole, brought an action for one instalment only, the fourth. That was decreed on the 4th October 1872. He has now instituted two suits, one before the second Bench for the fifth instalment with interest, and one in this Court for the sixth instalment with interest. The suit before the second Bench is still pending. These suits are contested. The defendants plead 'splitting of demand' and 'judgment recovered.' For the plaintiff it is argued that each instalment is a separate cause of action, was so intended by the parties, and that the instalments were never joined in one demand so as to form one cause of action. *Grimbly v. Aykroyd* is cited as an authority for this view. For the defendants it is contended that the bond

viz., that a promissory note for the payment of money by instalments is an *entire* con-

is an entire and indivisible contract for the payment of money; that the full term of the contract having expired, the right to recover the whole sum due was vested in the plaintiff when he brought his last suit in October, and that the judgment in that suit is a bar to a further action. The question is, which of these contentions is correct? *Grimbly v. Aykroyd* was a suit for goods sold on tickets or receipts, each ticket forming a separate cause of action, the amount of the whole being above the jurisdiction of the County Court. It was to enable the plaintiff to recover in that Court that he brought 228 suits, instead of one in the superior Court, and the question was whether the parties had ever treated these items as intending to form one entire demand. The Court drew a distinction between an account consisting of various items, which are intended to form an entire demand, and an account which comprises several distinct and independent matters, albeit such as might be included in one *indebitatus* count. In the latter case the plaintiff suing in a superior Court could not be compelled to consolidate his actions, whereas in the former, separate actions in respect of the several items of account would doubtless be deemed vexatious (*Broom's C. C. P.*, p. 54). At page 56, Mr. Broom says:—Suppose that the facts (in *Grimbly v. Aykroyd*) being in other respects as there appeared, the total amount of the plaintiff's claim fell within the limit of jurisdiction of the County Court, would he, if minded to divide or split it up into separate claims and sue for it by separate plaints, be prohibited by the interference of a superior Court from so doing? Without venturing to answer this question, we may at all events reasonably conclude that the Judge of the County Court would, under such circumstances, interfere and treat the judgment recovered in the suit first brought as a bar to any other action; and the Section of the County Court Act which prohibits a plaintiff from dividing his cause of action is referred to. That Section is the same as the 34th Section of the Act (IX of 1859) which provides:—'A plaintiff shall not be allowed to divide any cause of action for the sake of bringing two or more suits in any of the said Courts, but any plaintiff having a cause of action for more than Rs. 500, may abandon the excess, &c. I take this to mean that a plaintiff at the time of bringing his suit must include all the damages which have then accrued to him in respect of the particular contract upon which he claims.

The bond of 4th September 1871 is for Rs. 400, but the plaintiff deducted Rs. 112-8 as discount, and in point of fact the defendants only received Rs. 287-8. Since then he has received out of Court

	Rs.	117	8	0
By two decrees of Court	"	138	12	0
Up to this date ...	"	316	4	0
Add amount of two suits now pending ...	"	177	8	0
Balance (two instalments) of bond with interest ...	"	205	0	0
Total, Rs.		698	12	0

or nearly Rs. 700 in return for a loan of Rs. 287-8 made nineteen months ago. I do not think a plaintiff can nurse his claim in this fashion. One of the defendants had already been twice in prison on the decrees already obtained, and if two more are now passed against them, they might be in jail on the one, while their goods were under seizure on the other. I consider this vexatious and harassing. This is a state of things which the law does not allow in respect of one contract. A Judge has no right to look at the consequences of a judgment, and I merely refer to these points as indicating some of the grounds upon which the principle, which I think ought to be applied in this case, is based. There was no doubt a separate cause of action as each instalment fell due; but all having fallen in, the damages

† See also note (a) to *Dodd v. Wigley*, 7 C. B., 114; *Rex v. Sheriff of Herefordshire*, 1 B. & Ad., 672; *Bonsey v. Wordsworth*, 18 C. B., 325; and *In re Aykroyd*, 1 Exch., 490-93. The Indian (*mofussil*) cases, which have been decided with reference to special enactments, would seem to be inapplicable.

tract divisible for a time, but indivisible after the last or subsequent instalments have fallen due. I think that the several breaches or defaults in payment are then merged into one cause of action which cannot be divided and sued for separately: that the expression that each particular breach constitutes a separate and distinct cause of action is to be taken in the sense that when an individual instalment becomes due, the others not having become so, the plaintiff can sue upon it, but that as the others become due, a new contract for the total sum arises *toties quoties*, and that when several instalments are due at one time, he has not the option of selecting and suing for a particular instalment. This is the course followed by all other suitors in this Court whether the claim be for the recovery of money payable by instalments, or arrears of rent, or for use and occupation, and I may also say that this was also the practice throughout the mofussil, even before the promulgation of Act VIII of 1859.

I think that to hold an opposite view would be opposed to the policy of the law which abhors a multiplicity of suits, and the proceeding would be altogether harassing and vexatious to the defendants.

Suppose the view that, when several defaults have occurred in the payment of an instalment bond, it was optional with the plaintiff to select any one of them, and institute an action thereupon, be correct, and each separate breach constitutes a separate and distinct cause of action, could the plaintiff institute a suit for, say the recovery of the instalment which became due last, out of perhaps a dozen instalments, instead of being bound to sue for the first and so on in their order, so that by selecting the last in order of time, interest at the rate of 120 per cent. per annum on the other or earlier instalments might go on accumulating?

I think if the view contended for by the plaintiff be correct, which I did not admit, there would be nothing to prevent him from so proceeding, unless he were deterred by an idea that, if he so sued, it would create a presumption in favor of the payment of all the preceding instalments, and the Court

were complete, and the whole should have been included in the suit brought in October. I treat it as an entire contract for the payment of money, and as Mr. Sedgwick points out, it is an ancient rule of our law that one action only can be maintained for the breach of an entire contract, and a judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding.

I think this is the principle which should be applied in this case, and I would dismiss the suit."

would thus be recognizing and encouraging an abuse of the usury law.

A contract is to be performed in the sense in which both parties contemplated its performance, and it clearly appears to me to have been in the contemplation of the parties to the suit that the payments were to be made as each instalment fell due, and that, if several defaults were made, they could and would be united and sued for together. And the plaintiff in one instance has actually acted on this view, for he sued for half of one and the whole of another instalment. Such having been their original understanding, I think it would be quite inequitable to allow the plaintiff to follow an opposite course, the benefit of which understanding would never be conceded to the defendant, if the plaintiff instead of suing for all the instalments due at one time was allowed to bring an action for each separate unpaid instalment at his own option. There would thus be clearly an absence of that mutuality, if I may so express it, which is the essence of all contracts.

I think this is clearly a case to which the principle laid down in *Grimby v. Aykroyd*, 11 Exch., p. 479, applies, under the issue which Section 34 Act IX of 1850 raises.

For, suppose the total amount of the several unpaid instalments had exceeded Rs. 1,000, which is the utmost limit of the pecuniary jurisdiction of the Court, the plaintiff, if the view contended for by him be correct, would be fairly entitled to the privilege of suing for each instalment separately, yet the claim would be open to the objection under Section 34 referred to above, that he was dividing his cause of action for the sake of bringing two or more suits in the Small Cause Court. I think such an objection would be fully tenable, and if that would be so in the hypothetical case, it is equally applicable to the present case.

Some other cases to which I have been able to refer are cited by Mr. Story in a footnote in his *Treatise on the Law of Contract* at pp. 29 & 30, vol. I. These cases are:—*Badger v. Ticomb*, 15 Pick. R., 414; *Rudder v. Price*, 1 H. B., 550; *Pick v. Redman*, Dyer, 13; and *Cooke v. Wlarwood*, 2 Sand., 337. In the latter case the Court decided that an action might be maintained for such sum only as was due at the time when the action was brought, and have a new action as the other sums became due.

The question, however, that is now raised does not appear to me, up to this time, to have been decided in one way or the other,

and Mr. Temple, in his work on the Practice of the Calcutta Court of Small Causes, at page 39, says:—"It does not appear to have been decided whether it is illegal to divide a cause of action, the whole amount of which does not exceed the jurisdiction of the Court." He then, after quoting the following remarks of Pollock, C. B., in the case of *Grimby v. Aykroyd*, "whether, if the total amounted to £20, the highest amount then within the jurisdiction of the County Courts, and the items there were separated and sued for by separate plaints, the total being within the jurisdiction of the County Courts, which could then have given adequate relief, the suits could have been prohibited, is a question which need not in the present instance be discussed," states that the question does not appear to have been decided in a subsequent case.

I have dismissed the suit contingent upon the opinion of the High Court on the following points:—

1st.—Whether, when two or more instalments of a promissory note are due at the time of the institution of a suit, it is incumbent upon the plaintiff to unite them together and sue in one action, or optional with him to sue separately on each separate instalment, or on some or all joined together.

2nd.—Whether, if the Honorable Judges of the High Court be of opinion that the plaintiff was not at liberty to sue separately, and that all the unpaid instalments formed one cause of action, the judgment which plaintiff recovered on 4th October 1872, when the remaining instalments had also fallen due, can be treated as a bar to the present action.

A copy of the promissory note sued upon is also annexed.

No costs of reference have been deposited in this Court. Perhaps this is not necessary as the reference is made by the Court.

The promissory note was in the following terms:—

Calcutta, 4th September 1871.

Rs. 400.

We jointly and severally as principals promise to pay to Mr. H. Mackintosh, or order, the sum of Rupees four hundred in the following manner for value received in cash in hand paid on signing and delivering this note, that is to say:—

On the 4th October 1871	-	-	Rs.	50
" " November "	-	-	"	50
" " December "	-	-	"	50
" " January 1872	-	-	"	50
" " February "	-	-	"	50
" " March "	-	-	"	50
" " April "	-	-	"	50
" " May "	-	-	"	50
Total, Rs.				400

Should we neglect or fail to pay any of the instalments as it becomes due, then only shall such instalments as fall due and remain unpaid carry interest from its due date to date of payment at the defaulting rate of 10 per cent. per mensem.

(Sd.) JOHN GILL,

No. 33, European Asylum Lane.

(Sd.) C. J. BRIDGE.

Witness to Mrs. Bridge's }
signature,
(Sd.) J. GILL. }

Before the High Court, Gasper for the plaintiff contended that each instalment constituted a distinct cause of action, and that plaintiff could sue for them separately, or together. He cited Byles on Bills, 417, note, and Siddall & Rawcliffe, 1 Crompton & Meeson, 487. During the argument, the Court referred to *Blackwell v. Sumor Ahmed*, 6 Bom. H. C. Rep., O. C. J., 88, and without calling on the Counsel for the defendants, delivered the following judgment:—

Couch, C.J.—We are of the same opinion as the Judge of the Small Cause Court in this matter; it is incumbent on the plaintiff, when two or more instalments of such a promissory note as this are due at the time he brings his suit, to sue for them in one action, and he is not at liberty to sue separately for each instalment, or for some of them.

We are also of opinion that the judgment which the plaintiff recovered on the 4th of October 1872, when the other instalments had also become due, is a bar to the present suit.

We must direct the judgment to be entered for the defendants with the costs of reserving the question and stating it for the opinion of this Court, and otherwise arising thereout or connected therewith.

The 14th August 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Julkur Rights—Lease from Co-sharers.

Reference to the High Court by the Judge of the Small Cause Court at Bhanga, dated the 28th April 1873.

Raj Kristo Koebutto Doss and others,
Plaintiffs,

versus

Kula Chand Manjhee and others, *Defendants.*

Baboo Chunder Madhub Ghose for
Plaintiffs.

Baboo Doorga Mohun Doss for Defendants.

Parties exercising a right to fish in a julkur mehal, under a lease from part owners, cannot be regarded as trespassers in relation to other parties holding a similar lease from co-sharers.

Case.—IN this case plaintiffs seek to recover damages said to have been sustained in consequence of defendants' catching fish, without warrant, in the river Areal Khan, locally known as Noreekora, of which, it is alleged, they (plaintiffs) have been in quiet possession by virtue of an ijarah pottah obtained from Rajmohun and Hureemohun Boses, proprietors of a moiety of the julkur. The defence is a confession and avoidance on the ground that the defendants have obtained an ijarah pottah, similar to that of the plaintiffs, from Goloke Chunder Roy and others, co-sharers of the julkur mehal, in addition to several pleas in bar. The points for determination are :—

1. Whether the river Areal Khan is situated within the local jurisdiction of this Court; if not, whether this case is maintainable in this Court, inasmuch as the property, the damages accruing from which is the subject of this suit, lies beyond its jurisdiction?

2. Whether plaintiffs have a valid cause of action as against the defendants?

3. Whether this case, being a case for damages, is cognizable by this Court?

As the questions are important involving points of law, I beg most respectfully, at the instance of the parties, to solicit the opinion of the High Court under Section 22 Act XI of 1865.

With regard to the first point, it appears difficult to make out whether the river Areal

Khan is included in, or excluded from, the jurisdiction of the District of Furreedpore, when the notifications published in pages 417 and 939 of the Government (Bengalee) Gazette of 1867 and 1870 respectively, defining boundaries of the Districts of Furreedpore and Backergunge, are silent as to which district the river belongs. The only mention made in them is that the tracts on the east of the river fall within the jurisdiction of the District of Backergunge, and those on the west within the District of Furreedpore. But for a special Court like a Court of the Small Causes, I am persuaded to believe that any tract not specified in express terms as forming a portion of its jurisdiction, is beyond its jurisdiction. It being so, it remains to be seen whether an action, the cause of which has accrued beyond the jurisdiction of the Court, is maintainable on the ground that the defendants reside within the jurisdiction.

I think the residence of the defendants within the local limits of the Court is sufficient to constitute its jurisdiction, irrespective of the cause of action, or the situation of the property, out of which the damages are said to have arisen. I think, however, that the case fails on the last two issues. Plaintiffs, in their own showing, have not the sole right of fishery, when they admitted that they have derived their right from parties who are only fractional shareholders of the mehal. They have as much right to fish as the other shareholders of the mehal, or any body deriving title from them. Coming with a title, and I may say, valid title, the defendants are no wise responsible to the plaintiffs, whose title is distinct and not interfered with by the defendants. The case may be called one of *damnum sine injuria*.

Supposing the plaintiffs have a cause of action provided they can make out a case of exclusive possession, still, as the question of possession cannot be separated from a question of title, the determination of which solely rests in the ordinary Courts other than the Small Cause Court, I feel diffident to opine that the case is maintainable in this Court. A suit for damages of the nature in question, preceded by a decree of title and possession, may be held to be cognizable by a Small Cause Court, but it cannot be denied that, in the absence of such a decree, or other binding engagement of the like magnitude, a Court of Small Causes is destitute of jurisdiction, when it is called upon to try any point of real property, or of right to damages accruing therefrom. The analogy

may be drawn from a case of annuity in which a Court of Small Causes has no jurisdiction, if it be required to adjudicate upon a right to maintenance, but when a right to maintenance has once been settled by a competent Court, any future suit for arrears or balance of that maintenance is cognizable by the Court. A suit for balance of partnership generally is not cognizable by a Court of Small Causes, because it involves questions of right and account: it may, however, be brought within the pale of its jurisdiction, when the balance is struck, whereby the question is reduced to a simple question of contract, express or implied, and the necessity of looking into rights and accounts dispensed with.

In the present case, the defendants, as observed before, set up a pottah for fishery from certain shareholders of the julkur, which is a joint property, and the question turns up to be whether the plaintiffs being entitled to a fractional share of the mehal only are competent to make the defendants liable, either as tenants (as intimated in a previous case before the Moonsiff's Court), or as trespassers (as now alleged). If competent, they must sue under Act VIII (B.C.) of 1869 in one case, and under the general civil powers of the ordinary Court in another. I am not prepared to say that either of the questions may be made the subject of a suit in a Small Cause Court. Assuming for argument's sake that the Court is competent to look into rights and title incidentally to come to a conclusion to the subject-matter within its cognizance, the fundamental rule that no question of title to real property can be tried in a Court within the local jurisdiction of which the property does not situate, is infringed. Under these grounds, I think the case is not maintainable in this Court, and, therefore, contingent upon the opinion of the High Court, I dismiss the suit with costs.

The judgment of the High Court was delivered as follows by—

Jackson, J.—It is not necessary to decide the wider points raised in this reference because it is clear from the facts alleged that the plaintiffs have no cause of action for damages against the defendants. The plaintiffs have a lease from part-owners which gave them the right to fish over the julkur mehal, and the defendants have a similar lease from the other co-sharers. The defendants, therefore, cannot be trespassers any more than the plaintiffs themselves. If the plaintiffs consider themselves entitled to a

share in all captures that the defendants make and liable to account to the defendants for a share of all fish that they themselves take, that is a question to be settled in a different form. The defendants will be entitled to Rs. 32 as costs of this reference.

The 18th August 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Mortgage—Foreclosure—Reg. XVII of
1806 s. 8.*

Case No. 1912 of 1872.

*Special Appeal from a decision passed by
the First Subordinate Judge of Midna-
pore, dated the 30th August 1872, revers-
ing a decision of the Moonsiff of that
district, dated the 31st August 1871.*

Santee Ram Jana (Plaintiff) *Appellant,*

versus

Modoo Mytee (Defendant) *Respondent.*

*Mr Mun Mohun Ghose and Baboo
Bhowanee Churn Dutt for Appellant.*

No one for Respondent.

A mortgagee failing to fulfil one of the two conditions prescribed by Reg. XVII of 1806 s. 8, i.e., furnishing the mortgagor or his legal representative with a copy of his application to foreclose, cannot be said to be in a position to foreclose.

Markby, J.—We must support the judgment of the Subordinate Judge on this ground. Section 8 of Regulation XVII of 1806 requires that, when a mortgagee is desirous of foreclosing a mortgage, a written petition should be presented to the Court, and that the Judge, on receiving such written application, should cause the mortgagor or his legal representative to be furnished with a copy of it, and at the same time notify to him by a perwannah under his seal and official signature that if he does not redeem the property mortgaged within one year from the date of the notification, the mortgage will be finally foreclosed.

Now, assuming that the perwannah or notice here spoken of was properly served, still it is admitted in the present case that no copy of the written application was furnished to the mortgagor.

It is urged, first, that the notice contained all the information which would be contained in the written application; and, secondly, that it was not the fault of the mortgagee, but of the Court, upon that the mortgagor was not furnished with a copy of the written application.

But these are not considerations upon which we are at liberty to enter. The law prescribes two conditions which are to be fulfilled before a mortgage can be foreclosed, and we cannot say that the mortgagee before us, who has only fulfilled one of them, is in a position to foreclose.

The appeal must be dismissed, but without costs as the respondent has not appeared.

The 19th August 1873.

Present :

The Hon'ble J. B. Phear, *Judge.*

Joint Suitors—Splitting of Causes.

Case No. 309 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 27th November 1872, reversing a decision of the Moonsiff of Monghyr, dated the 20th June 1872.

Sheo Nundun Pershad and others
(Defendants) *Appellants,*

versus

Mukdoom Buksh (Plaintiff) *Respondent.*

Baboo Boodh Sen Singh for Appellants.

No one for Respondent.

Where plaintiffs suing jointly to recover khas possession of a specified portion of land, fail to make out their title to that portion, or any part thereof, and succeed only in making out the title of one of them to an undivided moiety of the whole land, this does not give them or either of them a title to an indefinite decree for such moiety.

Phear, J.—UNFORTUNATELY this case has been heard in the absence of the respondents, and I have not had the advantage of any argument on their behalf. But it appears to me clear that the decision of the Lower Appellate Court is erroneous in law and cannot be upheld. Indeed, in its present shape, it seems to be incapable of execution.

The plaintiffs consist of two sets of persons which have been respectively designated plaintiffs No. 1 and plaintiffs No. 2. They sue jointly to recover possession of a certain

specified 9 beegahs 15 cottahs of land, which they say they are the holders of, by a service-tenure, as heirs of the original grantees. Their case is that they were in the enjoyment of this land by the receipt of rent or bowlee profits from defendants No. 1, and that they sought to obtain a kubooleut from those defendants corresponding to a pottah which they had tendered. For this purpose, they brought a suit in the Collector's Court, but the defendants No. 2 then intervened as objectors, and the result was that the plaintiffs' suit for the kubooleut was dismissed. This decision of the Collector, the plaintiffs now say, had the effect of dispossessing them from the 9 beegahs 15 cottahs, and they seek in this suit to recover possession thereof. The defendants admit the original grant of the jageer to the plaintiffs' ancestor, and that the plaintiffs are his heirs: but the defendants No. 2 say that they have obtained a title to the land by purchase from the ancestor of the plaintiffs, and that the defendants No. 1 are in possession under them. They also set up the plea of limitation. The Lower Appellate Court has overruled the plea of limitation expressing its opinion that the evidence of the plaintiffs' witnesses establishes the fact of the plaintiffs' possession within the period of five or six years immediately antecedent to the suit; and having thus overruled the plea of limitation, the Lower Appellate Court rightly held that the burden of proof lay upon the defendants because they had admitted a *prima facie* case in the plaintiffs' favor. And the Court went on to say that the defendants had failed to rebut the plaintiffs' case as regards one-half share of the land which was the subject of suit; but as regards the other half share of the land, belonging, it is said, to one only of the parties, plaintiff, the Court was satisfied that that party, plaintiff, had admitted in a previous suit, and the fact was, that he had for consideration given up all claim to his share. On the facts thus found, the Lower Appellate Court has given a decree to the plaintiffs for half the amount of the land which they claimed, namely, 4 beegahs odd cottahs. But it seems to me very clear that the plaintiffs are not upon this state of facts entitled to any decree at all. They sued jointly to recover possession of a specified portion of land, and they failed to make out their title to that portion of land, or to any part of it. All that they made out was that one of the parties, plaintiff, was entitled to an undivided moiety of the whole land. This

did not give the plaintiffs, or either of them, a right to an indefinite decree for 4 beegahs odd cottahs. One test of this is that it would be impossible to execute such a decree as this. There is nothing on this record to show what 4 beegahs odd cottahs out of the 9 beegahs 15 cottahs the plaintiffs (or any of them) are entitled to be put in possession of. It is not an undivided share of the land more or less which the plaintiffs asked for, but it is khas possession of the entire land described in the plaint. And when the plaintiffs chose thus to join together in one claim, they cannot call upon the Court to divide their claim and to make two suits out of the one suit which they had chosen to bring. A decree must be given in favor of the plaintiffs as a whole for such specified portion of land as they make a title to, or not at all. And as I have already remarked, it is in this case impossible on the facts found by the Courts below to give a decree to the plaintiffs for any specific part of the land. I therefore think the decree of the Lower Appellate Court must be reversed, and the plaintiffs' suit dismissed, but without prejudice to the right of the plaintiffs, or of either of them, to bring a fresh suit on the same cause of action, if so advised.

I think there should be no order as to costs.

The 19th August 1873.

Present:

The Hon'ble F. A. Glover and G. G. Morris,
Judges.

Usufructuary (zur-i-peshgee) Mortgage—Declaratory Decree—Cause of Action.

Case No. 1879 of 1872.

Special Appeal from a decision passed by the Judge of Sarun, dated the 28th August 1872, reversing a decision of the Subordinate Judge of that district, dated the 30th June 1871.

Ablak Ram (one of the Defendants)
Appellant,

versus

Mohendro Pershad Tewaree and others
(Plaintiffs) *Respondents.*

*The Advocate-General and Baboo Chunder
Madhub Ghose for Appellant.*

Mr. C. Gregory for Respondents.

In 1832, B and M granted a zur-i-peshgee lease of a mouzah to T. Subsequently M mortgaged his share to D, L, and S. After this (in 1855) defendant's wife purchased M's rights and interests under a decree of

Court. A suit for foreclosure was then brought by the three mortgagees, who obtained a decree in 1856. Prior to the decree, one J S, who had purchased the interest of S, was made a party to the suit, and he sold his interest to plaintiff's father in 1861. Defendant, having failed in a suit to recover possession of M's share on the strength of his wife's auction purchase, obtained an ekrarnamah from M's sons relinquishing in his favor the rights they had inherited from their father. He then applied to the Collector, and, in spite of plaintiff's objection, had his name recorded in the towjee as proprietor in succession to M. To cancel the effect of this proceeding, plaintiff sues for declaration of title and confirmation of possession:

Held that as plaintiff was in possession and had been so from the time of the conveyance by J S, there was no necessity for his taking out execution of the foreclosure decree, the expiry of which therefore could not deprive him of his title to the declaratory decree now sought, defendant's conduct in the mutation proceeding being sufficient cause of action.

Glover, J.—THE facts of this case are somewhat complicated. The plaintiff seeks to have it declared that he is the proprietor of a 1a. 9p. 6k. 13m. 5d. share of Mouzahs Bhullosi, Bysari, &c., appertaining to Mehal Bukroul, on the strength of a deed of sale executed by one Jhappah Singh to his father in October 1861.

The mouzah, it appears, was made the subject of a zur-i-peshgee lease by all the proprietors in 1832 to Dookhan Tewaree, the great-grandfather of the plaintiff. Whilst the usufructuary mortgage was in force, viz., on the 5th November 1853, one of the mortgagors, Muttuk Deo Narain, made a further mortgage (a conditional sale) of his share of 5 annas 4 pie to Bhugwan Doss, Mudduu Mohun Lall, and Ram Lall Singh. These mortgagees sued in due course for foreclosure, and eventually got a decree against Muttuk Deo Narain on the 18th of April 1856. Previous to this, however, viz., on the 11th February 1856, Ram Lall Singh sold his interest in the mortgage amounting to a 1a. 9p. 6k. 13m. 5d. share to Jhappah Singh, who in his turn sold to the plaintiff's father.

The defendant claims under a sale in execution of decree of Muttuk Deo Narain's rights and interests in the property, of the 4th June 1855, and denies the genuineness of the conveyance by Jhappah Singh.

The Subordinate Judge dismissed plaintiff's suit, holding that the deed of sale by Jhappah Singh had not been proved. The Judge, on appeal, reversed that decision. He held that the sale was proved, and that Jhappah Singh was entitled to the share sold by him; that plaintiff and his ancestors before him had been in possession of the land ever since the zur-i-peshgee lease of

- 1832, and that it was therefore immaterial whether he could or could not execute the foreclosure decree of 1856. With regard to the defendant's claim, the Judge found it absolutely unfounded.

It is contended in special appeal that, inasmuch as the plaintiff asks to have his title declared on the strength of a kobalah based upon the foreclosure decree of 1856, and inasmuch as that decree has become infructuous by reason of lapse of time, it not having been executed within three years, the plaintiff has lost his right.

It is admitted that the plaintiff never did execute Jhappah Singh's decree, and also that execution of it has been long since barred. The special respondent's contention is that he had no occasion to execute it, having been all along in possession of the property as zur-i-peshgeedar through Dookhan Tewaree, his great-grandfather; that he was in fact both mortgagor and mortgagee, and had no reason to take any action in the matter of foreclosure. This appears to be so, and the Judge has found as a fact that the plaintiff has been all along in possession since the date of the zur-i-peshgee. Granting, therefore, that the present suit has been wrongly conceived, and that the plaintiff could not have his title declared on the strength of a decree which was barred by limitation, still the fact remains that his vendor had a clear and undoubted title, and that the sale to plaintiff's father was really made. It appears to me that it would be very hard measure to throw out the plaintiff's suit under such circumstances, the more particularly as the error in law, if there be one, has not in any way affected the decision on the merits of the case, and this is what Section 372 of the Code of Civil Procedure requires. The whole case has been fully gone into; not only has the plaintiff's title and possession been held to be proved, but the defendant Ablak Singh has been held to have no title at all.

But it is contended there remains another question. Granting that the plaintiff can have his title declared on the ground of his long possession under the zur-i-peshgee lease, to what extent does that title extend,—a question which depends on the number of heirs left by Dookhan Tewaree, and plaintiff does not allege that he is the sole heir. On the contrary, there is mention of other shareholders, so that before we can declare

the plaintiff's title in a *la*, 9p. 6k. 13m. 5d. share of the mouzah in question, we must first know whether his right as Dookhan Tewaree's heir amounted to so much. I do not think that we need go into this question, inasmuch as the Judge has found on the evidence that plaintiff is and has been in possession under the zur-i-peshgee lease of the entire share claimed by him, and this would be enough to entitle him to a declaratory decree as against a defendant who has been held to have no right of any kind to the share in question.

It has been urged by the special appellant that the Judge's finding on the kobalah is wrong; but I do not see this. He did not decide the point only on the evidence of the single attesting witness who was produced to prove the deed, but on other evidence also,—that of the putwaree, gomashah, and other persons who deposed to the purchase of the plaintiff from Jhappah Singh and to his possession under that purchase. The Judge admitted that the other surviving witnesses to the execution of the kobalah ought to have been summoned (the plaintiff applied to have them summoned, but his application was considered to be too late), but held that there was sufficient proof of the deed without them. There was no error of law in this that I can see.

It has been contended further that the plaintiff had no cause of action. I think, on the contrary, that he had a very sufficient cause. After Ablak Singh's wife had purchased Muttuk Deo Narain's right and interest in June 1855, the mortgagees gained their suit. Ablak Singh (acting on behalf of his wife) intervened on the ground that both the zur-i-peshgee of 1832, the decree, and deed of sale were collusive. This case was decided against him, and it was held that Ablak's wife had bought nothing. This was in 1856. In 1860, Ablak Singh brought a suit re-opening the same question, and failed again, it being held that the matter was *res judicata*, having been settled in the case of 1856.

Ablak Singh's next step was to get Muttuk Deo Narain's son to make the ekrannamah, which was found in the former proceedings of 1871 to be false, and on the strength of it induced the Collector to enter his name in the mutation register as proprietor of the land covered by it.

It seems to me that this was a most

decided injury done or attempted to be done to the plaintiff's rights over the land, and gave plaintiff a very sufficient cause of action against Ablak Singh. It cast a slur upon his title and lessened the value of his property if he had wanted to sell it. No purchaser would have come to terms with a seller whose land was not only claimed by another, but which actually stood in that person's name in the Collector's landholder's register.

I think that the special appellant has failed to make out any sufficient ground for our interference, and that this appeal should be dismissed with costs.

Morris, J.—Plaintiff by this suit seeks for a declaration of title and confirmation of possession in respect to a 1 anna 9 pie odd share in two villages, Bhullosi and Bysori, appertaining to Mehal Bukroul, on the strength of a deed of sale executed, October 4th, 1861, by one Jhappah Singh in favor of his (plaintiff's) father.

It appears that, on the 12th September 1832, Baram Deo Narain, Bis Deo Narain, and Muttuk Deo Narain granted a zur-i-peshgee lease of their 16 annas share in Bhullosi and Bysori to one Deo Kurun Tewaree, great-grandfather of plaintiff. Subsequently, Muttuk Deo Narain mortgaged his share, 5 annas 4 pie, in the entire mehal to Bhugwan Doss, Muddun Mohun Lall, and Ram Lall Singh. On the 4th June 1855, Bhugwanee Kooer, wife of Ablak Ram, defendant, appellant, purchased under a decree of Court the rights and interests of Muttuk Deo Narain. A suit for foreclosure was then brought by the three mortgagees in respect to the two villages, Bhullosi and Bysori, and they obtained a decree on the 18th April 1856. Prior to the decree, one Jhappah Singh, who had purchased the interest of Ram Lall Singh, viz., 1 anna 9 pie odd, was made a party to the suit, and he in his turn sold the interest to plaintiff's father on the 4th October 1861. One attempt was made in that year by Bhugwan Doss and Jhappah Singh to take out execution of the decree of 1856, but it fell through for want of prosecution. Another attempt was made in March 1865 by Bhugwan Doss and others (who the others were, is not stated, and Bhugwan Doss is the only ostensible party), but it failed as by that time execution of the decree was barred by the operation of the Statute of Limitation. Two years after, Ablak Ram, defendant, appellant, who

had failed in a suit which he brought in 1860 to recover possession of the share of Muttuk Deo Narain in the villages of Bhullosi and Bysori on the strength of his wife's auction purchase in June 1855, obtained an ekranamah or deed of acknowledgment from the sons of Muttuk Deo Narain, by which they relinquished in his favor all the rights which they inherited from their father. He then applied to the Collector to have his name entered in the towjee register as recorded proprietor in the place of Muttuk Deo Narain, and succeeded in spite of the objection of plaintiff under an order of the Collector, dated May 31st, 1867. It was to cancel the effect of this mutation proceeding as setting up a proprietary title in Bhullosi and Bysori in respect to the share of Muttuk Deo Narain adverse to his own under his deed of sale that plaintiff instituted the present suit. The first Court dismissed it on the ground that the conveyance of sale was not proved. The Judge on appeal reversed this decision. He held that the validity of the deed of sale and possession under it were sufficiently established by the evidence, and that "though the decree of the 18th April 1856 had never been executed, and "execution was now barred by limitation, "yet if plaintiff showed (as he did show) "that he and his ancestors had been in "possession all along since the execution of "the zur-i-peshgee lease of 1832, there did "not appear to be any necessity that he "should prove having taken actual possession "under the decree."

In special appeal it is contended, 1st, that the plaint discloses no cause of action, the mutation proceeding by the Collector affording no real cause of action; 2nd, that the Lower Appellate Court has pronounced the deed of sale valid for insufficient reasons; and 3rd, that inasmuch as the decree of 1856 is now dead and cannot be enforced, and the title of plaintiff is in reality based on that decree, his right is of necessity lost, and that his being in possession under another right, viz., as one of the heirs of the original zur-i-peshgeedar, Dookhan Tewaree, cannot render operative the deed of sale of 1861, and entitle him to a declaratory decree under it.

The first point is untenable because undoubtedly the mutation proceeding was an act hostile to plaintiff's title. It set forth to the world that Ablak Ram was recognized by the Collector as the sole proprietor of the share of Muttuk Deo Narain in the villages of Bhullosi and Bysori, although plaintiff claimed

- to be possessed of the share of Muttuk Deo Narain in them to the extent of 1 auna 9 pie odd.

The second does not constitute a proper ground of objection in special appeal. The Judge has found the deed of sale to be valid, not only upon the evidence of one of the attesting witnesses to it, but also upon the evidence of the putwaree, gomashlah, and other persons. He considered the deed sufficiently proved without the evidence of the other subscribing witnesses, to summon whom however plaintiff had made an application to the Subordinate Judge but without success, and it cannot be said that there was any error of law in it is.

On the third point, it must be observed that by the sale of October 1861, plaintiff acquired an undoubted right in the 1 auna 9 pie odd share of Muttuk Deo Narain in these villages. The decree of 1856, by which the share of Muttuk Deo Narain became the property of the mortgagees, from one of whom plaintiff derives, was then in force, and the Judge finds upon the evidence that ever since the date of the deed of sale, plaintiff had been in possession of the share which it conveyed to him. It is true that prior to the deed of sale plaintiff was jointly with other heirs of Dookhan Tewaree in possession of the two villages leased in zur-i-peshgee form by Muttuk Deo Narain and others, his co-sharers, and it may be that no formal possession was given to him under the said deed of sale; but this does not alter the fact that from the time of the conveyance up to date, he (plaintiff) has been in possession of the share covered by it. There was manifestly, under the circumstances, no necessity for plaintiff to take out execution of the decree of 1856 because he was already in possession of all that the decree secured to him. His title being once established under the decree, and his possession since the date of sale having been continuous and undisturbed, it cannot be said that his title has now become extinct because the decree is no longer capable of being put into execution. Certainly, his title must be held to prevail against defendant, appellant, who has been repeatedly pronounced by the Courts to have no right whatever in the property in question, and who is, as the Judge describes him in reference to it, "nothing more than a stranger." In this view the judgment of the Lower Appellate Court is affirmed, and the appeal dismissed with costs.

The 20th August 1873.

Present:

The Hon'ble Dwarkanath Mitter and E. G. Birch, Judges.

Landlord and Tenant—Kuboolent—Right of Suit.

Case No. 932 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 27th March 1872, reversing a decision of the Moonsiff of Amptah, dated the 9th October 1871.

Shunto Doss Autith (Defendant) *Appellant*,
versus

Hureehur Mookerjee (Plaintiff) *Respondent*.

Baboos Gopeenath Mookerjee and Luckhee Churn Bose for Appellant.

Baboos Ashootosh Dhur and Gopal Lall Mitter for Respondent.

A suit for a kuboolent cannot be maintained where the parties are not related to each other as landlord and tenant. But a landlord may legally sue for a declaration of the amount of rent with which his land ought to be assessed: and should the occupant not agree to the rent assessed by the Court, the landlord may sue him for use and occupation, or for ejectment, or for both.

Mitter, J.—I AM of opinion that this suit, so far as it relates to the demand for a kuboolent, cannot be maintained. There is nothing whatever on the record to show that the parties are related to each other as landlord and tenant, and as the existence of such relationship is the very foundation of a suit for a kuboolent, the plaintiff's claim for a kuboolent must fall to the ground. I have already expressed my opinion on this point at some length in special appeal No. 580 of 1872,* and I do not, therefore, wish to discuss it any further.

But the other portion of the plaintiff's claim, namely, that in which he asks for the assessment of the lands in question, appears to me to be quite legal. The validity of such claims was expressly recognized by the 28th Section of Act X of 1859, and although that Act has been repealed by Act VIII of 1869 of the Bengal Council, I do not see any reason why the plaintiff should not succeed so far as his claim for assessment is concerned, particularly when the cognizance of all causes of action under Act X of

* 19 W. R., 262.

1859 is distinctly provided for by the 32nd Section of Act VIII of 1869. Should the defendant agree to hold the lands subject to the rent which may be assessed upon them by the Court, well and good. Otherwise the plaintiff's remedy will be to sue him either for use and occupation, or for ejectment, or for both. But the plaintiff will not be entitled in this suit to obtain anything more than a simple declaration of the proper amount of rent with which the lands in question ought to be assessed.

With the above modification of the order passed by the Lower Appellate Court, I would dismiss this special appeal without costs.

Birch, J.—I concur.

The 20th August 1873.

• • Present :

The Hon'ble J. B. Phear, Judge.

Joint Proprietors—Service Land.

Case No. 571 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Bhaurulpore, dated the 12th December 1872, affirming a decision of the Moonsiff of Hingoo-serai, dated the 9th September 1872.

Beechook Pasban (one of the Defendants)
Appellant,

versus

Kullar Singh and others (Plaintiffs)
Respondents.

Moonshee Mahomed Yusoof for Appellant.

Baboo Mohendro Lall Mitter for Respondents.

The joint proprietors of a talook assigned to defendant a portion of land therein in consideration of chowkeedaree services rendered by him throughout the area of the talook. A butwarrah having been effected, plaintiff obtained a fourth share within which fell the assigned land. Upon this, plaintiff sued defendant to take back three-fourths of the service land on the ground that, being a one-fourth shareholder, he ought not to pay more than a one-fourth share of the consideration for the services rendered:

Held, that as long as defendant's services were required and rendered, plaintiff could not, in equity or justice, withdraw from defendant that land which had been given him by all the shareholders, when they were joint, as a consideration for those services.

Phear, J.—This seems to me a very plain case, and with deference to the Lower Courts

I think that they have taken an erroneous view of the character of the contest between the parties. Before the butwarrah took place, which I shall mention presently, the plaintiff and others were joint proprietors of a certain talook, and under that state of things a portion of land within the talook was assigned to the defendant by all the proprietors of the talook jointly in consideration of his services throughout the area of the talook as pasban, *i.e.*, services of a chowkeedaree character. The defendant, as I understand, duly performed the service which was the consideration for which he obtained this land, has all along continued to do so, and still does perform the same services. I asked the learned pleader who has appeared on behalf of the respondent to state whether it was part of his case that this service rendered by the defendant had altered or diminished in any respect, and I understand his answer to amount to this, namely, that the services rendered by the defendant were at the time of bringing the suit precisely the same in character and extent as they were at any time previously thereto since the date when he obtained the land in question in consideration thereof. This being so, a butwarrah of the talook was effected, and the plaintiff, as a result of the butwarrah, obtained a certain one-fourth share of it, but the whole of the land which the defendant held as consideration for his services fell within the share thus allotted to the plaintiff. The plaintiff now sues to resume or to take back from the defendant three-fourths of his service land upon this ground, if I understand the case aright, namely, that, although the defendant is performing exactly the same service which originally constituted the consideration for this land, still he (the plaintiff), being a one-fourth shareholder only of the talook, ought not to pay more than a one-fourth share of the consideration for those services, while the effect of the whole service land falling within his puttee is that he is made to bear the whole of the burden.

It seems to me manifest that in this reasoning there is a great fallacy. The grant or gift of the land, or permission to hold the land or lease of the land, call it what you will, was made by all the proprietors jointly to the defendant, and was complete and good; and he pays or renders the same consideration for it now as he did when he first obtained it. It is very clear, as it seems to me, that as long as that state of

things exists, he is entitled to retain the land, and it cannot be within the power of any one who has obtained an assignment of that land since the original transaction occurred to take away any portion of it out of his occupation.

It is unnecessary here to enquire whether the grant was of such a character as to be permanent or not. It may be that the defendant's services can be dispensed with to-morrow. But the services as a matter of fact have not been dispensed with, and they have not altered in any way. As long as those services are required and rendered, it appears to me that he is entitled to enjoy the land which he obtained as a consideration for them. And I may add that, when the plaintiff comes here to say that the whole burden ought not to fall on him, he ought first to show that the whole burden really does fall upon him, for I apprehend that probably when the butwarrah was made, and the entirety of this land was placed within his puttee at the assessment of one rupee, a full consideration was given to him for this burden by the way in which the line of division was drawn with regard to the land that was assigned to the other parties. Unless he can show that that land was allotted to him with the intention that it should be rated as full rent-paying land, he cannot rightly assert that the burden of the defendant's service has been made to fall upon his shoulders alone. So that I cannot help thinking, although both the Lower Courts have put the facts so very differently, that the plaintiff has probably got no sort of ground for his present complaint. However, this matter is not now before me, and I have no means of ascertaining the actual facts. As I before remarked, I abstain from expressing the slightest opinion as to whether or not it is possible for the plaintiff by himself or in concert with the other shareholders to put an end to the defendant's services, and to terminate the service holding. I only rest my judgment upon this ground that, as long as the defendant's services are required and rendered, the plaintiff cannot, in equity or justice, withdraw from the defendant that land which was given to him by all the shareholders together, when they were joint, as consideration for those services.

I think the decisions of the Lower Courts are wrong and must be reversed. The plaintiff's suit ought to be dismissed with costs in all the Courts.

The 21st August 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble E. G. Birch, Judge.

Land taken for Public Purposes—Compensation—Putneedar and Zemindar—Cause of Action.

Case No. 1706 of 1872.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 5th July 1872, modifying a decision of the Subordinate Judge of that district, dated the 31st January 1872.

Raye Kissory Dassee (one of the Defendants)
Appellant,

versus

Nilcant Day and another (Plaintiffs)
Respondents.

Baboo Romesh Chunder Mitter for Appellant.

Baboo Doorga Mohun Dass for Respondents.

Where land held in putnee is taken by Government for public purposes, the proper mode of settling the rights of the parties interested is to give the putneedar an abatement of his rent in proportion to the quantity of land which has been taken from him, and to compensate the zemindar for the loss of rent which he sustains. Accordingly, the compensation awarded was held to have been very fairly distributed where the zemindar received a little more than 16 years' purchase of the rent abated, and the putneedar received the remainder.

Where the compensation money was in deposit with the Collector without specification of shares, the putneedar's cause of action against the zemindar was held to have arisen when the former sought to obtain his share and was prevented by the latter's not joining him or enabling him to get it.

Couch, C.J.—THE plaintiff in this case was the holder of a putnee lease which had been granted to his father by the person who was represented by the defendant, and under whom the defendant claimed.

The lease was of certain mouzahs at a jumma of 1,308 rupees. The Government had taken for making a canal 72 beegahs 11 cottahs and 15 biswas of the land included in it, for which compensation to the amount of 3,151 rupees had been awarded and was in deposit with the Collector without the shares of the parties entitled to the compensation being specified.

The plaintiff, alleging that the defendant had not consented to the appropriation of the money by the plaintiff, brought the suit and claimed compensation to the amount

of 2,471 rupees and an abatement of the putnee rent to the extent of 40 rupees. He also claimed a refund of 145 rupees 5 annas and 8 gundahs which he said the defendant had realised as the rent of the land which had been taken by the Government. The defendant disputed the plaintiff's right to the compensation and to the abatement of rent and refund of the money claimed.

The Subordinate Judge of Midnapore, who tried the suit, held that the plaintiff was not entitled to an abatement of the rent; but as to the claim for compensation, he held, referring to the case of the Maharajah of Burdwan in page 328 of the *Sudder Reports* for 1860, that the plaintiff was entitled to a share of the compensation, and he decreed to the plaintiff 1,498 rupees and 10 annas out of the money which was in deposit with the Collector.

From this decision there was an appeal which was heard by the Judge of Midnapore, who said in his judgment that the questions which arose were, is the plaintiff, the appellant, entitled to receive abatement of his rent proportionate to his loss of land, and if so, to what amount? Is he entitled to any part of the compensation money in deposit; if so, to what amount? Has any cause of action arisen as against the defendant? This referred to a defence under the law of limitation which had been set up. He held upon the first issue that the plaintiff was entitled to an abatement of the rent to the extent of 44 rupees, taking as the rule upon which he had to calculate it the decision in the case of the Maharajah of Burdwan: but he said that, as the plaintiff had only claimed an abatement of 40 rupees, that amount only would be allowed. He then decided that there was a cause of action on the part of the plaintiff; and as to the share of the compensation said, that as the defendant did not deny that the plaintiff was entitled to some share, the only question which he had to consider was the amount; and following the rule laid down in the case of the Maharajah of Burdwan, he found that the plaintiff ought to receive 2,464 rupees as his share of the compensation. The result therefore was that the defendant, the zemindar, received out of the compensation 681 rupees, being a little more than 16 years' purchase of the rent of 40 rupees which was to be abated.

The defendant, the zemindar, has appealed to this Court, and the question we have to determine is whether the Judge was right in

allowing the abatement of the rent and in apportioning the compensation as he has. There was also a question upon the law of limitation. We think that the cause of action did not arise until the plaintiff sought to obtain his share of the compensation, and was prevented doing it by the act of the defendant, who would not join him, or enable him to get it from the Collector. The suit was not barred by the law of limitation. The abatement of rent depended upon the apportionment of the compensation. If the defendant had allowed the plaintiff to receive the whole of it, there would have been no right to an abatement of rent.

The way in which the case ought, we think, to be looked at is that it was in reality a sale by the zemindar and the putneedar to the Government of their interests in the land which was taken for the canal. It is true it was a forced sale, and the parties were obliged to part with their property by virtue of the law which enables Government to take land for public purposes; but they were to receive for the land taken a sum of money which was estimated so as to compensate them for being obliged to part with it. The compensation is supposed to be fixed with reference to the circumstances under which the land is taken. That ought to be apportioned between the parties according to the value of the interest which each of them parts with. The zemindar has a right to the fixed rent, and the loss he sustains is of so much of his rent. Any other possible injury, such as the chance of the putneedar throwing up the land, and its being diminished in value by what has been taken by Government, and still remaining, as it did, liable to pay the same revenue is, we think, not appreciable, and cannot be taken into account. If there is no abatement of the rent, and the putneedar continues liable to pay to the zemindar the same rent as he had to pay before, there would be nothing for which the zemindar ought to receive compensation. He would be in the same position as before, except with reference, as we have said, to the possibility of a loss which is scarcely appreciable. But the proper mode of settling the rights of the parties is to give to the putneedar an abatement of his rent in proportion to the quantity of land which has been taken from him. It is not fair that he should be liable to pay the same rent when a part of the land has been taken away. The decision of the Judge that the plaintiff is entitled to an abatement of the rent is correct, and is in

- accordance with the principle laid down in the case of the Maharajah of Burdwan.

This being so, the zemindar ought to be compensated for the loss of rent which he sustains, and the money ought to be divided between the parties accordingly. The putneedar's getting an abatement of his rent is to be taken into account as partly the way in which he is compensated for the loss of the land. The Judge has adopted what is a very fair rule. He has taken the amount of the abatement of the rent, and has given to the zemindar 681 rupees out of the compensation money. This is a proper mode of distributing the money between the parties, and in accordance with the rule which appears to have been laid down after great consideration and with much care by the late Sudder Court in the case referred to. We think, therefore, there is no ground for appealing against the decision of the Judge, and that the appeal ought to be dismissed with costs.

The 21st August 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble J. B. Phear, *Judge*.

Bond Decree—Execution—Guardian—Minor.

Case No. 276 of 1872.

Regular Appeal from a decision passed by the Judge of Sylhet, dated the 20th September 1872.

Nubo Kant Doss (Plaintiff) *Appellant*,

versus

Syud Abdool Juleel (Defendant) *Respondent*.

The Advocate-General and Baboo Kumla Kant Sen for Appellant.

Baboo Sreenath Doss for Respondent.

A decree made against a widow to the effect that money due from her under a bond should be realized from property pledged by the bond and from the defendant personally, cannot be executed against the property of her minor son.

A guardian is not competent to assert a right of preemption and make a contract of purchase on behalf of a minor, borrowing money in order to complete the purchase, and thereby binding the minor.

Couch, C.J.—THE defendant took a bond from Kanchun Dossee, the widow of Kristo Churn Doss, and mother of the plaintiff. In that she was described only as a widow,

and not as the guardian of the plaintiff, and she borrowed the money herself. It was said that she had made some agreement for the purchase of the share of the property of Choitunno Churn Doss, and some part of it she claimed under a right of preemption.

The defendant brought a suit upon the bond against Kanchun Dossee, and obtained a decree against her. The suit was not brought against the plaintiff, and the decree which was made in it was that the money claimed and due on the bond should be realized from the property which was pledged by the bond, and also from the then defendant personally.

It may be that a decree in that form could be executed against any property which Kanchun Dossee had, and that the defendant was not bound to execute it in the first instance upon the property which was mortgaged, but the decree only authorized him to take in execution the property of Kanchun Dossee, the defendant in the suit. It did not by its terms, nor did the bond upon which it was obtained, authorize him to execute it against the property of her son, the minor.

It is different from a case when a widow is sued for a debt of her husband and a decree obtained against her, where it has been held that the decree, although not in terms against her as the representative of her deceased husband, may be considered as such, and may be executed against the property of the deceased. Here the suit was upon a bond made by her, and the decree was against her. That certainly would not authorize the taking in execution the property of another person who was not named in the decree and was not a defendant in the suit. If the suit had been brought against the present plaintiff, the minor, the now defendant, the plaintiff in that suit would have had to prove a different case from what he had to prove when he was suing Kanchun Dossee alone. He could obtain a decree against her by proving the bond which she had executed; but if he had sued the minor, and attempted to charge him by reason of the execution of the bond by Kanchun Dossee, he would have had to prove that she executed it as the guardian, and that it was a contract that she was authorized to make on behalf of the infant. The question whether it was such a transaction as she, the guardian, might enter into for the infant and bind him, would have to be enquired into, and possibly a decree might not have

been obtained if the suit had been so framed. That shows that the decree-holder ought not to be allowed to execute the decree as if it was against the infant, which he has done, and is what the plaintiff in this suit complains of.

But supposing that the defendant should be allowed in the present suit to show that, although the decree does not authorize him to execute it in the way he has done, from the circumstances of the case and the nature of the transaction which was the foundation of the decree, he has some equity against the plaintiff, who ought not to be allowed to get back the money which the defendant has realized under the decree, we think the defendant has not shown that it was a transaction of that nature. What he has shown is that Kanchun Dossee, the mother and guardian of the minor, thought fit to assert a right of preemption in some property; and of other property, as to which whether there was a right of preemption or not would make no difference, she thought it right on his behalf to make a contract of purchase and to deposit a sum of money on account of it, not having at the time the power of completing the purchase without borrowing more money. In order to complete the purchase, and, as it is said, to save the money which had been deposited, she borrowed of the defendant at interest at the rate of 48 per cent. It cannot be considered that she was benefiting the infant by thus saving the money which had been already deposited, for if she had made use of his money in that way, she did so improperly, and could not have charged his estate with it.

It is impossible to speak of a transaction of this kind as one which a guardian would be at liberty to enter into on behalf of an infant. There would be no security for the property of infants if guardians could use it in such a way as this, and bind them by borrowing money in this way. Therefore, we think, even supposing, as we have said, that the defendant could in this suit say that he had some equity against the plaintiff, no equity is shown which would be a defence to it.

Then, in regard to any supposed ratification of this transaction by the plaintiff having been in possession of a part of the property which is said to have been purchased with the money so borrowed, there could not be a ratification unless he continued in possession after he became acquainted with all the circumstances, after he knew that the pro-

perty was purchased with money borrowed in that manner.

It does not appear that he knew any thing about it until just before he brought the suit. As soon as he came to know of the claim which the defendant made against him, he appears to have repudiated it and to have brought the suit claiming the money which the defendant had taken by means of the decree.

It appears to us that the defendant has no answer to the claim of the plaintiff, and that the decree of the Lower Court must be reversed, and the plaintiff declared entitled to a decree for the money received by the defendant and interest thereon from the date when it was demanded up to the date of realization at the rate of 6 per cent, per annum, with costs of the suit.

The 21st August 1873.

Present:

The Hon'ble F. A. Glover, *Judge.*

Act VIII of 1859, s. 230—Mortgagee's Possession.

Case No. 400 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 28th September 1872, reversing a decision of the Moonsiff of that district, dated the 24th July 1872.

Asgur Ali (Plaintiff) *Appellant,*

versus

Asgur Ali and others (Defendants)
Respondents.

Baboo Aukhil Chunder Sen for Appellant.

Baboo Debendro Narain Bose for Respondents.

A mortgagee's possession is not adverse to the mortgagor; and possession through a mortgagee is sufficient for the purpose of bringing a claim under Act VIII of 1859 s. 230.

Glover, J.—THE only point to be decided in this special appeal is whether the plaintiff was entitled to have his title decided under Section 230 of the Civil Procedure Code.

The Judge says that he was not, his reason being that he was not in possession when he preferred the objection under that section.

The Judge says that it is clear from the decision of another suit (No. 80), in which the plaintiff was unsuccessful, that the plaintiff was out of possession; and Section 230 contemplates the case of a person who has been in possession until he has been put out of possession, and therefore the plaintiff has no right to sue under Section 230.

The decree in suit No. 80 has been read to me, and I do not see how the Judge can say that the plaintiff was not in possession. That was a suit on a mortgage for the balance of the mortgage debt, and there had been, as was alleged, a verbal agreement that if the borrowed money was paid before the time fixed, plaintiff should recover immediate possession. The decision came to was that there was no such agreement, and that as three years still remained of the mortgage period, the plaintiff was not entitled to take khas possession of the land. It is not therefore right to say that the plaintiff was put out of possession by this order. The mortgagee's possession was not adverse to the mortgagor, and no authority has been shown to me which rules that possession through a mortgagee is not a sufficient possession for the purpose of bringing a claim under Section 230.

The agreement was that the plaintiff was to be paid six years' rent in advance, and that the mortgagee was to keep the land for that period.

If a zemindar is considered as in possession of his land through tenants, I do not see why a mortgagor should not have possession through his mortgagee.

Then it is said that Section 230 can only be taken advantage of in the case of decisions passed under Act VIII of 1859. No authority has been shown for this contention. The utmost that has been ruled is that Section 230 does not apply to possessory actions under Section 15 Act XIV of 1859.

The Subordinate Judge was, I consider, mistaken in holding that the plaintiff has no claim to the benefit of Section 230.

The case must be remanded to the Subordinate Judge for re-trial, the first Court having disposed of it on the merits.

Costs will follow the result.

The 22nd August 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Possessory Suit—Onus Probandi.

Case No. 389 of 1873.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 23rd September 1872, reversing a decision of the Moonsiff of Satkaneah, dated the 16th July 1872.

Ram Monee Mohurir (Plaintiff) *Appellant*,

versus

Aleemoodeen (Defendant) *Respondent*.

Baboo Aukhil Chunder Sen for Appellant.

Baboo Grish Chunder Ghose for Respondent.

In the case of the owner of land seeking to recover possession on the allegation that the party in possession has no right to continue in it, and showing a *prima facie* title to possession, he can claim a decree, unless the party in possession has a tenure entitling him to retain possession.

Couch, C.J.—THE Judge states that the plaintiff sued for possession of the land, alleging that he had obtained a putnee lease of it, and that the first defendant, the appellant before him, held illegal possession and refused to give up the land.

What the Judge calls illegal possession was really nothing more than this: the plaintiff said that he had a right to the possession of the land by virtue of his putnee, and that the defendant was keeping the possession without a title. It was not questioned by the Judge that the plaintiff was the putnee-dar; the portal was filed, and the Judge said that the lessee had no other rights than his lessor had. The lessee had the rights which the lessor had, assuming, as we ought, that the lease passed to the plaintiff the lessor's rights. The plaintiff then had made out a *prima facie* title to the possession of the land. The defendant, in fact, did not dispute that the land was the plaintiff's, and was ready to pay him rent, but he alleged that he had a right to continue to occupy

the land. The case was of such a nature that it was necessary for the defendant to show that he had such a right. The plaintiff had shown that he was *primâ facie* entitled to the possession, and unless the defendant had a tenure which would entitle him to keep the possession, the plaintiff ought to have had judgment to recover possession.

The Judge appears to have taken what we must say is rather a strange view of the case. He appears to have fixed upon the allegation, as he considered it was, in the plaint that the defendant had held illegal possession, and to have thought that this made it necessary for the plaintiff to prove that the defendant had taken illegal possession of the land, and if the plaintiff did not prove *primâ facie* that the possession of the defendant was illegal, he must fail in his suit, although the defendant did not prove what his title was to hold the land.

There is no authority for this. In the case of the owner of land seeking to recover possession of it, alleging that the person in possession has no right to continue in it, on showing that he had a title to the land, he would *primâ facie* be entitled to recover possession. The whole judgment appears to us to have gone upon a false view of the case, for in another part the Judge says:—"The plaintiff does not sue to have a declaration of what his rights and those of the appellant are exactly. He treats the defendant, appellant, as a trespasser and seeks to eject him as such. He has failed to show that he is a trespasser, and his suit must therefore be dismissed."

When the plaintiff showed that he had a title, unless the defendant proved that he had a right to continue in possession, he was a trespasser. The plaintiff had shown that the defendant was a trespasser so far as to require proof of the title from him. The Judge, it appears to us, has required from the plaintiff an amount of proof which it was not necessary for him to give, and has not required that proof from the defendant which he was bound to give to meet the *primâ facie* case which there was on the part of the plaintiff arising from the admitted fact that he was, as putneedar and as having all the rights of his lessor, entitled to the land, unless there was a tenancy which gave to the defendant a right to continue in possession.

The decree must be reversed, and the suit must be remanded for re-trial. The costs will follow the result.

The 3rd July 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Act XIV of 1859 s. 1 cl. 15—Limitation—Usufructuary Mortgages—Acknowledgment—Construction.

On Appeal from the High Court of Judicature at Fort William in Bengal.*

Luchmee Buxsh Roy

versus

Runjeet Ram Panday.

The limitation enacted in Act XIV of 1859 s. 1 cl. 15 embraces every kind of mortgage, including usufructuary mortgages.

The acknowledgment referred to in the said clause must bear the signature of the mortgagee himself; the signature of an agent would not satisfy. The words of the Statute, which being one of limitation, ought to receive such a construction as the language in its plain meaning imports.

THIS is a suit brought by the appellant, the descendant of Gujraj Roy, who in the year 1790 mortgaged five mouzahs to Motee Ram Panday, the ancestor of the present respondent. It may be assumed, for the purpose of the present judgment, that the mortgage was a usufructuary mortgage, or in the nature of one. The defence made to the suit, independently of a defence on the merits, was that it was barred by limitation, and the only question is whether the suit has been so barred or not.

It appears that, in the year 1802, the mortgagee had been dispossessed of four of the five mouzahs by the sons of the mortgagor; apparently, it was an unlawful dispossession, and he brought a suit in that year for the restoration of possession, to which suit the then mortgagor set up the defence that the mortgage money had been fully satisfied by the usufruct of the property. An account was taken, and it was found that so far from the mortgage debt having been satisfied, interest had accrued upon it to a larger amount than the debt itself; and it was therefore ordered by the Court that the mortgagee was entitled to a restitution of possession, and it made a declaration, which perhaps was unnecessary, that he was entitled to hold possession until the amount found

* From the judgment of L. S. Jackson and Markby, JJ., in Regular Appeal No. 134 of 1869, decided 23rd November 1869;—12 W. R., 413.

due was fully paid. That suit and the decree in it do not really affect the question, because the present suit was not brought within 60 years after the decree in 1804. Even if it had been within that period, it might be a question whether that decree at all affected the right of the mortgagee to rely on limitation, for the suit was brought only to recover the possession of the mouzals which had been unlawfully taken from the mortgagee by the mortgagor or his sons.

The limitation which applies in this case is found in Section 1 Clause 15 of Act XIV of 1859, and is in these terms: "To suits against a depositary, pawnee, or mortgagee of any property, moveable or immoveable, for the recovery of the same, a period of 30 years if the property be moveable, and 60 years if it be immoveable, from the time of the deposit, pawn, or mortgage; or if in the meantime an acknowledgment of the title of the depositor, pawnor, or mortgagor, or of his right of redemption shall have been given in writing signed by the depositary, pawnee, or mortgagee, or some person claiming under him, from the date of such acknowledgment in writing." It is clear that a period of 60 years has elapsed since the mortgage.

Two points have been made by Mr. Leith for the appellant; first, that a usufructuary mortgage is not within this Clause at all. He pointed out that in usufructuary mortgages the possession was consistent with the original intention of the parties until the mortgage debt was paid off, and contended that a limitation which run from the time of the mortgage could not apply to them; but the Legislature has enacted this limitation in the most general terms, and in language sufficiently large to embrace every kind of mortgage. There can be no doubt it was deliberately done, and that the provision found in the fourth Clause of the third Section of Regulation II of 1805, which excluded cases of mortgages or deposit from the regulations relating to limitation, was designedly set aside, a different policy prevailing with those by whom the recent Act was passed.

Their Lordships therefore think that this mortgage is clearly within Act XIV of 1859.

The other and the main question is whether, 60 years having elapsed from the date of the mortgage, the right of the mortgagor to bring this suit has been kept alive by such an acknowledgment as is referred to in the Statute.

Now, the Section requires an acknowledgment of the title of the mortgagor, or of his right of redemption, to be given in writing, signed by the mortgagee. In this case two documents are relied upon, which appear in a suit instituted in the year 1847. It seems that in that year a descendant of the mortgagor instituted a suit in the Civil Court of Lohardugga for an adjustment of accounts. The suit was dismissed on the ground that the Court was not competent to entertain it; but in that suit the respondent, the mortgagee, gave a mooktearnamah to a mooktear to defend it, and the mooktear filed a written statement which it is alleged contains an acknowledgment of the title of the mortgagor and of his right to redeem. It is plain that neither of the documents by itself satisfies the Statute—the mooktearnamah is signed by the mortgagee, but contains no acknowledgment of title; the written statement of the mooktear does contain, or may be assumed to contain, an acknowledgment, but is not signed by the mortgagee—and their Lordships think that it is impossible to put those two documents together so as to satisfy the requirements of this Statute.

It was argued that the signature of an agent was sufficient, and that the mooktear being authorized to defend the suit, and to use such arguments as he thought fit, authority was given to him to make an acknowledgment of title; and that such an acknowledgment having been made and signed by him, the Statute was complied with. Their Lordships think that is not so. The Statute must receive a construction according to its plain words. It requires the signature of the party himself, namely, the mortgagee, and it would be a wrong construction of it to hold that any other signature would satisfy those words.

The same question arose upon Lord Tenterden's Act in England, and was decided in the case of *Hyde v. Johnson* (2nd Bingham's New Cases, p. 776). Chief Justice Tyndal, in giving judgment there, says—"When therefore we find in the Statute now under consideration that it expressly mentions the signature of the party only, we think it a safer construction to adhere to the precise words of the Statute, and that we should be legislating, not interpreting, if we extended its operation to writings signed not by the party chargeable thereby, but by his agent."

Their Lordships entirely adopt that principle of construction, which they think applicable to the present case.

They are also of opinion that the written statement cannot be said to be incorporated into the mooktearnamah so as to make it a part of the document signed by the mortgagee. The mooktearnamah is no more than an authority to the mooktear to defend the action in the best way he can and according to the best of his judgment.

It has been said that this case ought to be decided upon an equitable construction, and not upon the strict words of the Statute; but their Lordships think Statutes of Limitation, like all others, ought to receive such a construction as the language in its plain meaning imports. Statutes of Limitation are in their nature strict and inflexible enactments. The object of the Legislature in passing them is to quiet long possession and to extinguish stale demands. Such legislation has been advisedly adopted in India as it has been in this country, and their Lordships think that in construing these Statutes the ordinary rules of interpretation must prevail.

Their Lordships are therefore of opinion that the judgments of the Courts below are correct, and they must humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

The 8th July 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock,
Sir Montague E. Smith, Sir Robert P.
Collier, and Sir Lawrence Peel.

*Hindoo Law—Ancestral Property—Will—Issue
—Consent of Parties—Res-judicata—Cause of
Action—Act VIII of 1859 s. 2.*

*On Appeal from the High Court of Judi-
cature at Fort William in Bengal.**

Soorjomonee Dayee

versus

Suddanund Mohapatter.

In a suit brought by the heir-at-law to recover possession of immovable property devised by his father to one B, where, *inter alia*, plaintiff sought to set aside the will on the ground that the testator had not the power to make any of the devises of realty that it contained, inasmuch as he could not devise ancestral real property, and both parties invoked the opinion of the Court upon this question, which was raised by the pleadings and argued:

Held, that the judgment upon it was not *ultra vires*, merely because an issue was not framed which, strictly speaking, embraced the whole of it, and that the Court were called upon to decide whether or not the will was operative as to all, or to any, or what portion of the property.

Held, that the Court had power, with the consent of the parties, to substitute for the relief specially sought, *viz.*, the cancellation of the will, the simple declaration that such deeds could not affect the ancestral property, and that they were at liberty to sue afresh to recover such property.

The words "cause of action" in Act VIII of 1859 s. 2 are to be construed with reference rather to the substance than to the form of action.

THIS suit was brought by Suddanund Mohapatter, as adopted son and heir-at-law of Chuckurdhur, against Soorjomonee Dayee, the widow of Bonomalee, the devisee of Chuckurdhur, to obtain possession of all the estate, real and personal, of Chuckurdhur. Other defendants were joined, but inasmuch as Soorjomonee is the only appellant against the judgment, which was in favor of the plaintiff, the rights of the plaintiff, as against Bonomalee, have only to be considered. The claim to the personal property was abandoned by the plaintiff, nor did he dispute that Chuckurdhur had the right to dispose by will of all real property which had been self-acquired by him; but he asserted that there was no self-acquired real property; that all the real property of Chuckurdhur was either ancestral in the strict sense of the word (that is, acquired by inheritance from his father) or bought out of the income of ancestral property, whereupon it also became ancestral. The defendant did not maintain that Chuckurdhur could devise his ancestral property, properly so called, but maintained that what he had bought from the income of ancestral property was, according to the Mitakshara law (which is admittedly applicable to this case) self-acquired and disposable by his will.

She further maintained that this very question had been decided in favor of Bonomalee in a previous suit between the plaintiff and him. She also contended that in fact a large portion of the property had been bought by Chuckurdhur from other sources than the income of ancestral property.

The High Court held that this question had not been so determined as to bind the plaintiff. After directing further evidence to be taken upon the point, they found as a fact that the real property bought by Chuckurdhur had been bought from the income of ancestral property; and that being so, they ruled that according to the Mitakshara law he had no power to dispose of it by will.

* From the judgment of Loch and Hobhouse, JJ., in Regular Appeal No. 249 of 1864, decided 5th May 1869:—11 W. R., 436.

The first question which arises in the cause is, whether or not it had been decided in a manner binding upon the parties that Chuckurdhur had the power to devise by will such real property as he had acquired out of the income of his ancestral property.

The suit in which this question is alleged by the defendant to have been so decided was brought by the plaintiff against Bonomalee and others in January 1859, and judgment was given in it in 1863. It is not now denied by the Counsel for the respondent that this question was in fact decided by that judgment; but it is argued that the question was not so raised as to give the Court jurisdiction to decide it, and that the judgment upon it was *ultra vires*.

The facts necessary to make that suit intelligible are as follows:—

Chuckurdhur had first adopted the plaintiff, and subsequently adopted Bonomalee. On the 5th April 1849 he made a will, giving a nine-anna share of his real estate to the plaintiff, and a seven-anna share to Bonomalee, dividing his personal estate equally between them. The will contained a clause to the effect that if either devisee disputed it, he should forfeit all benefit under it. Chuckurdhur shortly afterwards published this will by filing it in the Court of the Collector.

Violent disputes having arisen between the plaintiff and his father, in the course of which the plaintiff disputed his father's competence to make a will, Chuckurdhur, in 1857, filed in the same Court two petitions, the purport of which was that he disowned the plaintiff as his son, and adopted, and acted upon, the clause of the will depriving either devisee who disputed it of any benefit under it. On the 14th January 1859 the plaintiff filed a plaint against his father and against Bonomalee and some other persons who had obtained property under deeds executed by his father, for cancellation of those deeds, for cancellation of the adoption of Bonomalee, for cancellation of the will, and for maintenance. He alleged the will to be inoperative and fraudulent, on the ground that his father had no testamentary power over his ancestral property, to which the plaintiff was jointly entitled with him during his life; he further alleged that his father had acquired such property as he had not inherited from the proceeds of his ancestral property, and that such property was therefore ancestral; and in a schedule appended to his plaint, entitled "a schedule of the disputed property," he distinguished ancestral zemindaries from

zemindaries acquired from the profits of ancestral estate.

The case of Kanth Narain Singh v. Prem Lal Paurey and others, reported in the third volume of the Weekly Reporter, page 201, decides that it was competent for the plaintiff to bring such suit in his father's lifetime.

Chuckurdhur, in his answer, maintained his right of disposition by will in these terms: "The plaintiff writes that I had no authority to transfer ancestral estates by sale or gift, and prays for the reversal of the will and the deeds of gift executed by me. This is his mistake, because I am the owner of all the estates, ancestral and self-acquired, and have every power to alienate them by sale or gift in various ways." He further denied the fact that his purchases of land were made solely from profits of the ancestral estate. In the replication the plaintiff re-asserted his right of inheritance, and maintained that in that right he was entitled to require, among other things, the cancellation of the will. He re-asserted that all the estates of his father were ancestral estates, and none self-acquired according to Hindoo law, and that by that law they are not transferable by sale or gift or otherwise; and joined issue on the fact that the purchased estates were acquired otherwise than from the proceeds of ancestral estate.

In their Lordships' opinion, the effect of the pleadings is that the plaintiff sought, *inter alia*, to set aside the will on the ground that the testator had not the power to make any of the devises of realty that it contained inasmuch as he could not devise ancestral real property, and all his real property was in point of law ancestral, consisting of such as he had inherited from his father and such as he had bought out of the income of it.

It is true that this question is not raised as distinctly as it ought to have been in the issues, the only issue directly referring to the will being whether or not it was assented to by the plaintiff, an issue clearly embracing but a portion of the controversy between the parties.

That the question was, however, raised in the suit, appears not only by the pleadings, which have been referred to, but by the grounds of appeal by the plaintiff from the decision of the Principal Sudder Ameen which was against him, wherein he insists (among other things) that the will is wholly irregular and illegal, and that the defendant had no power under the shasters to execute such a will or wills. He says, "all the properties, moveable and immoveable, are ancestral, and not the

"self-acquired properties of my adopted father; therefore according to the provisions of the Mitakshara shaster, gifts of even a portion without the consent of your petitioner are illegal and improper." Chuckurdhur, in opposition to the grounds of appeal, insists that his will was valid and regular, and that he had the power to dispose by it of all property not ancestral in the proper sense.

If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires*. To so hold would appear scarcely consistent with the case of *Mussamat Mitna v. Syad Fuzl Rub* and others, reported in 13 Moore's Indian Appeals, page 573,* wherein it was held that in a case where there had been no issues at all, but where nevertheless it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the Court, the judgment upon it was valid.

Their Lordships are of opinion that the plaintiff sought for the decision of the Court on this question, whether his father had or had not the power to dispose of all or part of his real property by will, he himself dividing that property under two heads, *viz.* ancestral property, and that derived from the income or profits of ancestral property; that this question was raised by the pleadings and treated by both parties as before the Court; and that the Court had jurisdiction, and indeed were called upon, to decide whether or not the will was operative as to all, or to any, or what portion of the property. The Principal Sudder Ameen decided in substance in favor of the plaintiff as far as the ancestral property was concerned, but dismissed his suit as far as it related to the property derived from the income of ancestral property.

An appeal from this decision came before the High Court on the 28th February 1863, after the death of Chuckurdhur, and it now becomes necessary to refer to the judgment given on that appeal. After stating that "the present suit is brought by Suddanund for maintenance, to declare the adoption of Bonomalee invalid and unlawful, to declare that the father's repudiation of the plaintiff as a son is illegal and beyond the father's powers, to declare the will and petitions

"disinheriting him inofficious and inoperative, and to set aside certain deeds of sale and gift" (with which we are not concerned at present), the High Court proceed to say that the case involves several important questions of Hindoo law, and they thus divide those questions:—First, "the status of Bonomalee, whom the plaintiff seeks to declare to be no lawful son of Chuckurdhur;" secondly, "the status of plaintiff, who seeks to be declared a son, and whom the father sought to repudiate;" and thirdly, "the property." After deciding in favor of the plaintiff on the question of adoption and status, they then proceed to deal with the question of property in these terms:—"With respect to the property, our decision must follow the decision regarding personal status above laid down. By the Mitakshara law applicable to the case, the son has a vested right of inheritance in the ancestral immoveable property; and as the question was raised before us, we must declare that the ancestral property is only that actually inherited, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property, for the income is the property of the tenant for life to do as he likes with it. On the other hand, the father has it in his power to dispose as he likes of all acquired and all personal property. Such, then, being the status of the parties, and such the law, we declare that the will and the petitions sought to be set aside are inofficious and inoperative so far as they profess to deprive the plaintiff, the only son of Chuckurdhur, of his right to succeed to the whole ancestral immoveable property held by the said Chuckurdhur; but as regards all other property, seeing that Chuckurdhur was entitled to do as he chose, and chose to disinherit his son, we cannot interfere, and in so far dismiss the prayer of the plaintiff. There is not the least doubt that by the petitions presented by Chuckurdhur, he unmistakably published his will and desire to deprive the plaintiff of all right to the property so far as he could deprive him, and give it to Bonomalee." They then deal with the question of consent to the will, which they find in favor of the plaintiff; and then they proceed to say, "the father being dead, the appellants have waived a decision of the claim to maintenance; and with respect to the deeds of sale and gift sought to be set aside, as the appellants must again go into Court to

* 15 W. R., P. C., 15.

- “recover possession of the ancestral property, “they are satisfied with the simple declaration “that such deeds cannot affect the ancestral “property, and that they are at liberty, in “any fresh suit, to recover possession of all “such ancestral property.” In their Lordships’ opinion the Court had the power to substitute, with the consent of the parties, such a declaration for the relief specifically asked for, *viz.*, the cancellation of the will.

The 2nd Clause of Act VIII of the Code of Procedure of 1859 is in these terms: “The Civil Courts shall not take cognizance “of any suit brought on a cause of action “which shall have been heard and determined “by a Court of competent jurisdiction in a “former suit between the same parties or “between parties under whom they claim.” Their Lordships are of opinion that the term “cause of action” is to be construed with reference rather to the substance than to the form of action; and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this Clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res-judicata*, founded on the principle “*nemo debet bis vexari pro eadem causâ*.” This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to in the 3rd volume of Atkyns, *Gregory v. Molesworth*, in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the Duchess of Kingston.

- Applying these principles of law to the present case, their Lordships are of opinion that there has been a binding decision between the plaintiff and the defendant, who, for this purpose, stands in the position of her late husband, that Chuckurdhur’s will was operative to dispose of all such real property as he had acquired out of the income of ancestral property. Their Lordships agree with the High Court that Chuckurdhur did in fact devise the property over which he had

the power of disposition to Bonomalee; and they regard the petitions of 1857 not as in the nature of new wills, but as declarations of his intention to act upon the clause of forfeiture in his will,—a clause which, according to the case of *Cook v. Turner*, reported in 15 Meeson and Welsby, page 727, and in Symonds’ Reports, would be valid and operative.

Having come to this conclusion, their Lordships forbear from intimating any opinion on the points of law which would have arisen had their decision on this been different, on one of the most important of which the judgment of the 28th of February 1863, and that which is now under appeal, are in conflict.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed, and the decree of the Principal Sudder Ameen affirmed.

Considering that the complications which have arisen have been due, in some measure to the manner in which Chuckurdhur himself dealt with his property, and that the Courts below, both that of the Principal Sudder Ameen and the High Court, thought this a case in which each party ought to bear his own costs, their Lordships are of opinion that each party should bear his own costs in this appeal and before the High Court.

The 17th July 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Putnee and Dur-putnee — Transfer — Sale for Arrears of Rent — Deposit — Liability of Assignor — Limitation — Act XIV of 1859 s. 14.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Luckhinaraia Mitter and another

• *versus*

Khettro Pal Singh Roy and another.

A dur-putnee was granted by defendants with full powers of sale or gift to S. who sold it to plaintiffs with the stipulation that plaintiffs would cause the requisite mutation of names in the putneedars’ books; but that, in case of delay in the substitution of plaintiffs’ names, S would not be entitled to profit or subjected to loss. Plaintiffs did not register the transfer, and were not recognized by defendants as their tenants. But in order

* From the judgment of Kemp and Glover, JJ., in Special Appeal No. 1668 of 1870, decided 10th February 1871;—15 W. R., 125.

to stay the sale of the putnee talook for an arrear of rent due to the zemindar by the putneedars (defendants), and thereby save the dur-putnee, plaintiffs, on 17th November 1864, lodged a sum of money in the Collector's Court. Plaintiffs, after infructuous litigation in the Courts of Hooghly, brought a suit on 8th June 1869 to recover the money deposited, and obtained a decree, which was subsequently upheld by the High Court:

Held that the decision of the High Court was correct, the payment not having been voluntary, but one which the plaintiffs were compelled to make.

Until such an assignment as the one in the above case has been registered, or the assignee has been accepted by the putneedar as his tenant, the assignor is not discharged from liability, which may be enforced by sale of the dur-putnee in execution.

According to the true construction of Act XIV of 1859 s. 14, a plaintiff is entitled to deduction of the whole time in which he has been fruitlessly engaged in prosecuting a suit *bond fide* and with due diligence for the same cause of action, in which he fails in consequence of a final determination that the Court had no jurisdiction.

THIS is an appeal from a judgment of the High Court pronounced upon special appeal in a suit in which the respondents were plaintiffs, and the appellants were defendants. The suit was brought to recover a sum of money lodged by the plaintiffs in the Court of the Collector of East Burdwan, in order to stay the sale of a putnee talook called Mouzah Astara for an arrear of rent due to the zemindar from the defendants, who were the putnee talookdars, and thereby to save a dur-putnee talook of the second degree, which had been created by the defendants out of their said putnee talook.

The dur-putnee was granted by the defendants to Sitanath Ghose, at an annual rent of 5,496 rupees, in consideration of a bonus of 100 rupees, and it was stipulated that Sitanath was to have full powers of sale or gift, but was not to under-let in sub-putnee without the consent of the putneedars. Sitanath sold and assigned the dur-putnee to the plaintiffs for the sum of 2,925 rupees, and it was stipulated that the plaintiffs were, in the usual manner, to cause mutation of names in the putneedars' books, by causing Sitanath's name to be removed and the plaintiffs' names inserted instead, and that the plaintiffs should duly pay the dur-putnee rent; and further that, if there should be any delay in causing mutation of names, and Sitanath's name should remain on the putneedars' books, it should not entitle him to profit, or subject him to loss. The plaintiffs did not register the transfer in the *serishta* of the defendants, and the defendants never recognized the plaintiffs as their tenants. The money deposited by the plaintiffs was applied in discharge of the rent due from the defendants as putneedars, and the sale of the putnee was stopped. It

was contended that the money deposited by the plaintiffs was a voluntary payment, and, consequently, that they were not entitled to recover the amount from the defendants. The Court of first instance held that the plaintiffs were entitled to recover, and gave them a decree for the amount with interest from the time of the commencement of the suit. The Zillah Judge, upon regular appeal, reversed that decree; but upon special appeal the High Court reversed the decision of the Zillah Judge, and upheld the decree of the Court of first instance. From that decree the defendants have appealed to Her Majesty in Council.

Their Lordships are of opinion that the decision of the High Court is correct. The plaintiffs were assignees of the dur-putnee talook, and, though the transfer was not registered, they had the right and were compelled to deposit the amount of rent due to the zemindar in order to protect their own interest. They made the deposit, and the defendants had the benefit of it. The plaintiffs are consequently entitled to recover the amount from the defendants. The law upon the merits of the case is very clearly and accurately laid down in the judgment of the High Court, and it is scarcely necessary for their Lordships to enlarge upon it.

Several cases were cited by the learned Counsel for the appellants, and amongst others the case of Anundchunder Bannerjee v. Soobulchunder Dey, *Sudder Decisions*, 1857, page 1195. In that case it was held that a mortgagee of a dur-putnee tenure out of possession could not recover from the putneedars an amount deposited by him to prevent the sale of a putnee talook for arrears of rent due from the putneedars: that he was not the holder of a talook in the second degree, and had no authority under Section 13 Regulation VIII of 1819 to make the deposit. It does not appear what the nature of the mortgage was, and it would seem that the dur-putneedar had not paid his rent to the putneedar, for it was said "the mortgagee might have sued the dur-putneedar for the money which he had been compelled to pay." Without knowing more of the facts of that case, it is impossible to say whether the decision was correct or not. It is, however, unnecessary to do so, as that case is very different from the present.

It may be remarked, however, with reference to that case, as well as to the case cited from 6 Weekly Reporter, Act X Cases, page 8, in which it was held that the amount deposited by the plaintiffs in the present case could not be set-off in a suit brought by the

present defendants against Sitanath for subsequent instalments of the dur-putnee rent, that neither of them is of any greater weight than the decision of the High Court now under appeal, and that their Lordships could not, upon the mere authority of those two cases, hold that the decision of the High Court in the present case was wrong.

With the exception of those two cases, none of the numerous authorities cited by the learned Counsel for the appellants are in point. In some of the cases it is impossible to ascertain from the reports what were the precise facts; many of them had no relation to putnee or dur-putnee tenures; and none of them appear to carry the case further than this, that the grantor of a dur-putnee talook is not bound to recognize the assignee of the tenure until the transfer has been registered in his *serishta*, and that, until such registry has been effected, he may sue the original dur-putneedar for the rent, and sell the tenure in execution of a decree obtained in such suit without notice to the assignee. This is the only effect of the cases cited from 2 Hay's Reports, page 14; 2 Weekly Reporter, Civil Rulings, page 282; 10 Weekly Reporter, Civil Rulings, page 466.

Those decisions are quite consistent with the ruling of the High Court. Until the assignment has been registered, or the assignee has been accepted by the putneedar as his tenant, the assignor is not discharged from liability, and such liability may be enforced by the sale of the dur-putnee talook in execution of a decree against him for the rent.

It was contended that the decision reported in 6 Weekly Reporter, Act X Rulings, page 8, in which it was held that the money deposited by the plaintiffs could not be set off in an action against Sitanath for arrears of the dur-putnee rent, was a bar to the present suit, as an adjudication by a competent Court in a former suit upon the same cause of action. Their Lordships are, however, of opinion that that determination was not one within the meaning of Section 2 Act VIII of 1859. It was merely determined in a suit under Act X of 1859 that Sitanath was not entitled to credit for the payment made by the plaintiffs.

As to the point of limitation, their Lordships are of opinion that the High Court was correct in holding that the present suit was not barred. It is unnecessary to determine whether the period of limitation was three years under Clause 9 Section 1 Act XIV of 1859, or six years under

Clause 16 of that Section. The deposit sought to be recovered by the plaintiffs in the present suit was made on the 17th November 1864, and the present suit was commenced on the 8th June 1869. On the 30th October 1867 a suit was instituted by the plaintiffs against the defendants in the Zillah Court of Hooghly to recover the amount claimed in the present suit. The defendants pleaded to the jurisdiction of that Court, and, on the 14th April 1868, the Principal Sudder Ameen rejected their plea and gave judgment for the plaintiffs. The defendants appealed to the Judge, who, on 31st July 1868, reversed the decision of the Principal Sudder Ameen, and, on special appeal to the High Court, the decision of the Judge was affirmed on the 26th of May 1869.

Deducting the whole period occupied in the suit commenced in Zillah Hooghly from the time of the commencement of that suit to the time when the High Court gave final judgment therein on special appeal, the present suit was commenced within three years from the time when the cause of action arose. It has been found as a fact that that suit was prosecuted *bonâ fide*, and there is no reason for contending that that finding was in consequence of any error in law, or that the suit was not prosecuted with due diligence. Their Lordships are of opinion that, according to the true construction of Section 14 Act XIV of 1859, the whole time occupied in that suit, including the time during which the special appeal to the High Court was pending, must be deducted. It was contended on the part of the appellants that, as the decision of the Principal Sudder Ameen was annulled by the Judge in consequence of a defect of jurisdiction, the time in which the plaintiffs were engaged in the special appeal to the High Court, who affirmed the decision of the Judge, cannot be deducted under the provisions of Section 14 of the Act. The words of that Section are not very clear, but their Lordships are of opinion that, giving them a reasonable construction, the whole time in which plaintiff has been fruitlessly engaged in prosecuting a suit *bonâ fide* and with due diligence for the same cause of action, in which he fails in consequence of a final determination in the suit, whether upon appeal or otherwise, that the Court in which the suit was brought had no jurisdiction, is to be deducted.

The learned Counsel for the appellants complained of the protracted litigation in reference to the plaintiffs' claim, and he stated in terms of indignation that the case

had been before eleven different tribunals. But surely the appellants are not the persons to complain, when they have been the cause of the whole of this protracted litigation, first, by neglecting to pay their rent to the zemindar, and thus rendering it necessary for the plaintiffs for their own protection to deposit the money with the Collector; then by refusing to allow credit for the amount in the suit against Sitannath; afterwards by objecting to the jurisdiction of the Principal Sudder Ameen of Hooghly; then by objecting to the amount of stamp on the plaint when it was transferred to the Court in Burdwan; and, finally, by appealing against the decision of the Principal Sudder Ameen in this suit, which was ultimately upheld by the High Court.

In short, the appellants have resisted by every means in their power the endeavours of the plaintiffs to recover the amount which they were obliged to deposit, of which the appellants have had the benefit, and which they, according to every principle of justice and good conscience, ought to have repaid.

It is idle to say that they were afraid of repaying the money lest by so doing they should be held to have recognized the plaintiffs as their tenants before the registration of the assignment, or to contend that the appellants are not bound to repay the amount deposited because they would have benefited by the sale of the putnee free from incumbrances.

Their Lordships will humbly recommend Her Majesty in Council to affirm the decision of the High Court with the costs of this appeal.

The 12th August 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Putnees—Dissolution of Contract.

Case No 1183 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 15th June 1871, affirming a decision of the Deputy Collector of that district, dated the 21st April 1870.

Heera Lall Pal (one of the Defendants)
Appellant,

versus

Neel Mouce Pal and others (Plaintiffs)
Respondents.

Mr. C. Jackson and Baboos Sreenath Dass and Anund Chunder Ghosal for Appellant.

The Advocate-General and Baboos Mohinee Mohun Roy and Grish Chunder Mooherjee for Respondents.

It is not open to a putneedar of his own choice to throw up the putnee, and, by so doing, escape his liability to pay rent. The contract, though not indissoluble, can only be dissolved by an act of the Court and the result of proper enquiry.

Jackson, J.—THE point which we reserved for consideration in this case is whether it is optional with a putneedar to surrender the putnee which he holds at any time, and to plead such surrender in answer to a suit for rent. We are clearly of opinion that, whether or not the Civil Court might upon sufficient ground give relief in a suit brought to dissolve a contract between the zemindar and his putneedar, it certainly is not open to a putneedar of his own choice to throw up the putnee, and, by so doing, escape his liability to pay rent. We do not say that the contract is indissoluble, because many circumstances might arise in which the interference of a Court of Justice might fairly be invoked to put an end to it; but the dissolution of such a contract must, we think, be an act of the Court and the result of proper enquiry, and cannot be taken by the putneedar alone and pleaded in answer to a suit for rent. In this view of the case, we think that this appeal must be dismissed with costs.

The 18th August 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Rent-suit—Intervention—Act VIII of 1859 s. 73

Case No. 651 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 28th November 1872, affirming a decision of the Moonsiff of Ranaghat, dated the 30th December 1870.

Gooroo Prosunno Banerjee (one of the Defendants) *Appellant,*

versus

Guggun Chunder Dutt (Plaintiff)
Respondent.

Baboo Huree Mohun Chuckerbutty for
Appellant.

Baboo Bhowanee Churn Dutt for
Respondent.

In a suit against a ryot for rent of certain land, where a third party got himself made a party under Act VIII of 1859 s. 73, and, as between him and the plaintiff an issue was raised whether the property formed part of one mouza or another :

Held that this was giving an entirely new scope and character to the suit; and that the remedy of any third party who might have been dispossessed by the proceedings of the other parties lay in a civil suit to recover possession.

Jackson, J.—THE suit out of which this special appeal arises was a suit for rent brought by the plaintiff against a ryot for rent of certain land. Thereupon, the special appellant, Gooroo Prosunno Bauerjee, thought fit, as he calls it, to intervene, and got himself made a party under Section 73 of Act VIII of 1859, and as between him and the plaintiff an issue was raised whether the property formed part of one mouza or another. This was giving an entirely new scope and character to the suit. In the result a decree was given to the plaintiff, against which decree Gooroo Prosunno appealed to the District Court, the ryot defendant taking no further steps in the matter. The Judge at first set aside, but afterwards in review affirmed, the decree of the Moonsiff, and the intervening defendant has now come up in special appeal before us. We think the question which the special appellant seeks to raise ought not to be raised in special appeal. The question was between the plaintiff and the ryot. If the ryot had taken land under plaintiff, and either agreed or made himself liable to pay rent to him, the plaintiff is entitled to a decree against him. If by those proceedings Gooroo Prosunno had been dispossessed, as he apparently was, it was his business to bring a civil suit to recover possession of the land. We therefore think it proper to strike all issues relating to him out of the record, and to affirm the decision simply against the original defendant. The special appellant will pay his own costs in the suit, and also pay the costs of this appeal.

The 19th August 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, Judges.

Evidence—Act I of 1872 s. 167—New Trial—Kuboolent—Consideration.

Case No. 732 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 30th December 1872, affirming a decision of the Moonsiff of Goulundo, dated the 28th September 1872.

Wooma Kant Bukshee (Defendant)
Appellant,

versus

Gunga Narain Chowdhry and others
(Plaintiffs) *Respondents.*

Baboo Grija Sunkur Mojoondar
for Appellant.

Baboo Sreenath Doss and Kalee Mohun Doss for Respondents.

Where a copy of a deposition is improperly admitted, such admission is not ground of itself for a new trial, if, independently of the evidence so admitted, there is sufficient evidence to justify the decision.

A ryot on executing a kuboolent for rent, whether enhanced or otherwise, is not entitled to any consideration beyond that which he has in the occupation of the land.

Jackson, J.—It appears to us that the judgment of the Lower Appellate Court is just and right. It may be that the copy of the deposition of a living witness, although taken in a proceeding between the same parties, was not properly admitted. But Section 167 of the Evidence Act declares that the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. In the present case, there undoubtedly was amply sufficient evidence.

Then as to the complaint of the special appellant that the evidence of certain witnesses of his who spoke to the existence of the document in question was not duly considered, we can only say that that evidence having been read to us, we have

no doubt ourselves that we should have disbelieved it if it had been given before us.

Then something was said about the consideration for the kubooleut. It is a novel view to us that a ryot, on executing a kubooleut for rent, whether enhanced or otherwise, is entitled to any consideration beyond that which he has in the occupation of the land. If he engages to pay enhanced rent, it is presumably because either the land has become more valuable, or else the circumstances under which he is entitled to hold at a lower rate have ceased. Either of these circumstances affords ample consideration.

Then as to the Court below having given a decree in full, that seems to be correct. The defendant had deposited a portion of the sum claimed, but considering the allegation with which he deposited that amount the plaintiff was not bound to receive it. He can withdraw his deposit, but he will have to pay the full claim of the plaintiff.

The special appeal will be dismissed with costs.

The 19th August 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act VIII (B.C.) of 1869 s. 37—Jurisdiction—Co-sharer—Measurement.

Case No. 742 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 13th February 1873, reversing a decision of the Moonsiff of Serampore, dated the 31st August 1872.

Pearce Mohun Mookerjee (Defendant)
Appellant,

versus

Raj Kristo Mookerjee (Plaintiff) *Respondent.*

Baboo Anund Chunder Ghosal for
Appellant.

Baboo Umbika Churn Banerjee for
Respondent.

The word "jurisdiction" in Act VIII (B.C.) of 1869 s. 37 refers not merely to local jurisdiction, but also to jurisdiction as to value.

A co-sharer in an estate is not competent to measure the lands of the tenants.

Jackson, J.—THE special appeal must, we think, prevail, because the Judge's decision is

erroneous on the point he has decided, namely, that the word "jurisdiction" refers not merely to local jurisdiction but also to jurisdiction as to value, which meaning, we think, is clearly indicated by the words of Section 37 of Act VIII (B.C.) of 1869.—"in the Court which would have jurisdiction in case such suit had been brought for the recovery of such land." As between the applicant and the party who opposed him, the lands were the lands of the dur-putnee.

But there are other grounds upon which the plaintiff, now special respondent, could not exercise the right of measurement. In the first place, he is not the person entitled to receive the rent of the lands, there being another party, the dur-putneedar, who is interposed between him and the occupying tenants. In addition to that, the petitioner was not the landlord; he was only one of several persons who together make up "the landlord" in the property; and it has been held in several instances, more particularly in the case in XIX Weekly Reporter, page 280, that a co-sharer in an estate is not competent to measure the lands of the tenants. If it were otherwise, the tenants would be liable to be incessantly harassed by applications from all the different co-sharers whenever they thought fit to have the lands measured.

On all these grounds, we think the plaintiff's suit cannot proceed. The decision of the Lower Appellate Court will be set aside with costs.

The 21st August 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Breach of Contract—Infructuous Sale.

Case No. 784 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Bachergunge, dated the 18th December 1872, affirming a decision of the Moonsiff of Madareepore, dated the 30th December 1871.

Rajkishore Nag (Plaintiff) *Appellant,*

versus

Mudhoosoodun Roy and others (Defendants)
Respondents.

Baboo Bacharam Mookerjee for
Appellant.

*Baboos Doorga Mohun Dass and Sreenath
Dass* for Respondents.

Where a party after contracting to sell land to another, executing a bynaputro, and receiving a part of the consideration money, sells the same land to other parties, such sale is vitiated if the vendees are aware of the contract into which their vendors had previously entered, even though specific or formal notice of the contract had not been given to the vendees.

Jackson, J.—THE plaintiff's allegation was that the defendant Mudhoosoodun had contracted with him to sell him certain share in 1 anna or 1-16th of the 8 annas belonging to him in certain talooks, and had executed a bynaputro and received Rs. 95 as part of the consideration money, but that he had failed to execute the kobulah when called upon to do so, as he was bound to do, in the month of Chyet, and that subsequently he joined in a sale to the other defendants, whereby half of the 1 anna in dispute and another half belonging to other parties were sold to those defendants for a sum of Rs. 1,100. The object of the suit, therefore, was to compel the performance of the contract. The defendants 2, 3, and 4 were interested in the suit only in so far as they had taken part of the 1-anna share which the defendant Mudhoosoodun had covenanted to sell to the plaintiff. The plaintiff has got a decree, except as to the half anna sold to defendants 2, 3, and 4, in respect of which the Lower Appellate Court's decision is in these words:—"As there is no valuable evidence to show that the purchaser defendants had received due notice of the contract and the breach thereof on the part of the defendant, the purchase which is *bona fide* cannot be set aside. There appears no reason, therefore, for interfering with the decision of the first Court." By these words we understand the Lower Appellate Court to find that, independently of the question of notice, there was no fraud on the part of the purchaser defendants, and that in fact they had not received due, that is, formal, notice of the contract. It would not, however, be necessary to prove any formal or specific notice in order to vitiate the sale. It will be enough if they were aware of the contract between the plaintiff and their vendors. It seems there is evidence on the record on the plaintiff's part to show that they had such knowledge. Whether such evidence is sufficient or not is a question for the Lower Appellate Court to decide. The case, there-

fore, must go back to the Lower Appellate Court in order that an issue may be framed and tried whether the defendants other than Mudhoosoodun had knowledge of the contract entered into between the plaintiff and Mudhoosoodun. If it be found that they had such knowledge, the plaintiff will be entitled to a decree, and those defendants will necessarily be required to sell or join in a sale to the plaintiff. It will be open to the parties to put in fresh evidence, as the issue was not raised in either of the Courts below. The costs will follow the result.

The 22nd August 1873.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, Judges.

*Act VIII (B.C.) of 1869 s. 30—Limitation—
Fraud.*

Case No. 865 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 24th January 1873, affirming a decision of the Moonsiff of Bohur, dated the 30th September 1872.

Radha Kishore Roy and others (Plaintiffs)
Appellants,

versus

Ameer Chunder Mookhoty and another
(Defendants) *Respondents.*

*Baboos Doorga Mohun Dass and Kashee
Kant Sen* for Appellants.

*Baboos Romesh Chunder Mitter and Huree
Mohun Chuckerbutty* for Respondents.

In a suit to contest an account brought against a gomashita under Act VIII (B.C.) of 1869, the only ground on which plaintiff can claim an allowance of time beyond the period of limitation provided in s. 30, is by showing that there was fraud in the case and that he came to the knowledge of it within a year before the date of its action.

Glover, J.—THE only question in this special appeal is whether the Judge is right in deciding that the plaintiff's suit is barred by the special law of limitation laid down in Section 30 Act VIII (B.C.) of 1869, or not.

The plaintiff is the zemindar, and the defendant is or was a gomashita employed by him and his co-parceurs; and in a suit brought against his gomashita by one of the co-shares it was decided that the defendant

should deliver accounts, and he accordingly did deliver an account on the 11th of March 1871.

The present suit was brought on the 25th of April 1872, some days beyond the one year which the law allows, on the allegation that certain items entered in the defendant's accounts under the head of expenditure were improper, and ought not to be allowed.

The plaintiff says that it was necessary for him to get copies of the accounts before he could examine into their correctness, and that he did not get those copies until the 25th of April 1871; that on the 10th of May he finished his examination of the accounts, and then for the first time discovered certain defalcations. He contends that he can count his time from that date, *viz.*, from the 10th of May 1871.

It seems to us that the only way in which the plaintiff could claim any such allowance is by showing, as provided by the latter part of Section 30, that there was fraud in the case, and that he had only come to the knowledge of the fraud on the 10th May 1871.

But in the present case there is no allegation of fraud anywhere. The plaintiff says that he did not agree to the account rendered by the defendant, and that certain sums were entered as expended which ought not to have been spent. But this is a very different thing from alleging fraud. Then it is said why should the plaintiff be considered to have brought this suit under Act VIII (B.C.) of 1869, and not under the ordinary law applicable to civil suits. The answer to this is that, where the law lays down a special procedure in certain kinds of cases, such cases must be governed by that procedure. The only law by which a suit against an agent for accounts such as the plaintiff seeks for in this case is the Rent Law of 1869, and the plaintiff was therefore bound to bring his suit under that law.

We have been referred to the case of Chowdhry Chatterpaul Singh v. Fouzdar Roy, reported in *Marshall*, page 405, but we find that that case was different from the present. There the learned Judges laid down that where a dismissed agent rendered an account showing a balance due to the landlord, a suit might be maintained against him notwithstanding the lapse of more than a year from his dismissal, because a cause of action arose out of the admitted balance of account. Now in this case there was no such balance. Moreover, the words relied upon were *obiter dicta*, and formed no part

of the judgment of the Court which turned on other points.

The plaintiff's appeal must be dismissed with costs.

Mitter, J.—I concur in dismissing this appeal.

The 25th August 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Mortgage—Redemption—Recompense—Interest—Regulation I of 1798.

Case No. 200 of 1872.

Regular Appeal from a decision passed by the First Subordinate Judge of 24-Pergunnahs, dated the 29th June 1872.

Burno Moyee Dossee (Plaintiff) *Appellant*,

versus

Benode Mohinee Chowdhrair (Defendant) *Respondent*.

Messrs. J. T. Woodroffe and R. T. Allan and Baboo Ashootosh Dhur for Appellant.

Baboos Hem Chunder Banerjee, Nilmadhub Bose, and Jadub Chunder Seal for Respondent.

Where the contract between a mortgagor and a mortgagee provides for the payment of the principal sum on a specified date, and for the payment in the meantime of interest thereon, the mortgagor cannot have a partial redemption of the property under Regulation I of 1798 which was not intended (s. 5) to alter the terms of a contract settled between the parties except as regards illegal interest. Should the mortgagee consent to allow the principal sum, or part of it, to be paid off before the time fixed, he would be entitled when agreeing to this to make the payment of interest a condition of such redemption.

Couch, C.J.—THE suit was brought by the plaintiff as executrix of Kisino Kishore Ghose for the possession of certain estates described in the plain and mortgaged to him with other estates by the defendant on the 29th of September 1860 for Rs. 95,000. The plaintiff stated that certain portions of the properties were sold and thereby a portion of the debt was liquidated, and the remaining debt not having been paid in due time, proceedings were taken under Regulation XVII of 1806 in the Judge's Court of 24-Pergunnahs, and as regards the estates situate in the District of Jessore in the Judge's

• Court of Jessore; and the mortgaged properties mentioned in the schedule to the plaint were foreclosed on the 18th of May 1868. • The plaint was filed on the 4th of April 1871, and it was ordered that a reference should be made to this Court under Section 11 of Act VIII of 1859.

On the 20th of May 1871, the Subordinate Judge, after hearing the vakeels of both parties, framed the following issue:—

“*First*.—Has the whole amount covered by the deed of conditional sale been paid up by the defendant; if so, can the plaintiff’s suit for the possession of this property go “on?” and—

Ordered that the 7th of August next should be fixed for the determination of the case on its merits; both the parties should appear on that date with their witnesses, and the defendant should file within one month her proofs and a statement showing payments made by her.

On the 17th of June the defendant filed a written statement. This, instead of being only a statement of payments made by her, raised two new questions. It alleged that the notice of foreclosure was not served upon the defendant, and she was not aware of it; and that she entered into no contract with the plaintiff’s husband, nor was there any to the effect that she would pay compound interest. The proviso in the mortgage deed is—

“Provided always and it is hereby agreed and declared between and by the said parties hereto of the first and second parts and the true intent and meaning of them and of these presents is that if the said Sreemutty Binode Mohinee Chowdhraïn, her heirs, executors, administrators, and representatives do and shall well and truly pay or cause to be paid unto the said Kistno Kishore Ghose, his heirs, executors, representatives, administrators, or assigns the full sum of Company’s Rupees ninety-five thousand on the 29th day of September, which will be in the year of Christ one thousand eight hundred and sixty-two, and in the meantime shall pay interest thereon at the rate of 15 per cent. per annum half-yearly; that is to say, on the 29th day of March and 29th day of September in each and every successive year, the first payment to be made on the 29th day of March one thousand eight hundred and sixty-one, and in case of default in payment of such interest on the days hereinafter specified shall pay interest at the like rate upon the amount of such

interest from the day it falls due to the day of payment, and all such other sum or sums of money as the said Kistno Kishore Ghose, his heirs, executors, administrators, representatives, or assigns, shall or may choose to pay, lay out, or expend for or on account of the said Sreemutty Benode Mohinee Chowdhraïn in payment or satisfaction of the Government revenue of the said talooks, zemindaries, mouzahs, lands, and premises hereby conveyed, or of any or either of them, or any part thereof, in case of neglect or default in payment thereof by the said Sreemutty Benode Mohinee Chowdhraïn, her heirs, executors, administrators, and representatives to the Collector or other authorized officer of Government on the days and times when such revenue shall become due and payable, together with interest thereon at 15 per cent. per annum from the respective dates of advancing the same to the day of payment, and shall produce and show to the said Kistno Kishore Ghose dakhillas or other receipts and discharges for the same, and shall also pay all costs and charges attendant upon the preparation and registration of these presents and of all their collateral securities, and all other costs and charges of the said Kistno Kishore Ghose as between attorneys and client without any deduction, defalcation, or abatement whatsoever, then the said Kistno Kishore Ghose, his heirs, representatives, and assigns, shall and will at any time thereafter upon the request and at the costs and charges of the said Sreemutty Benode Mohinee Chowdhraïn, her heirs, executors, administrators, representatives, or assigns, re-convey the said talooks, zemindaries, mouzahs, lands, hereditaments, and premises hereinbefore described, and hereby granted and released or expressed and intended so to be unto the said Sreemutty Benode Mohinee Chowdhraïn, her heirs, representatives, or assigns, or as she or they shall order or direct free from all incumbrances whatever made, done, or committed by the said Kistno Kishore Ghose, his heirs, representatives, executors, administrators, or assigns, or any of them.”

On the 20th of July the plaintiff filed a petition denying what was alleged in the defendant’s written statement, and on the 7th of August the following further issue was framed:—

“*Second*.—Whether the notice of foreclosure has legally been served?”

On the 10th of August there were the following proceedings:—

It is said that on that day before the commencement of the proceedings the defendant's pleader, Baboo Nilmadhub Bose, said that it cannot be urged that the defendant has clearly admitted the plaintiff's alleged mortgage. This objection was not brought at the time of the settlement of the issues. The mortgage deed does not appear to have been clearly admitted in the statement filed by the defendant, by order of this Court after the settlement of the issues; that matter has been vaguely stated. The Court, therefore, thinks it proper to examine the vakel Baboo on the subject of the mortgage. *Question.*—Does the defendant admit the mortgage deed which has been filed by the plaintiff, and on the ground of which this suit has been brought as a genuine document?

The defendant's pleader in answer said— I am not in a position to give any answer on this point. Defendant's karpurdaz, Panchann Banerjee, who is present before the Court and acquainted with the subject matter, can say it. His deposition may be taken.

Ordered, that the defendant's karpurdaz, Panchann Banerjee, who is acquainted with the facts of the case, be called to give his deposition.

And there is the examination of Panchann Banerjee, who said, after stating that he was the son of Ram Chunder Banerjee, and that his age was 47 or 48 years, "I am defendant's am-mookhtar. I know all the facts of this case."

Being interrogated said—"As the mortgage deed marked A. on the ground of which this suit has been brought, is in English, I cannot say whether my principal admits it or not. As I held no conversation with my principal, I cannot say whether she admits it or not. As I do not know English, I cannot say whether that document is genuine or not."

And the Subordinate Judge observes very truly—"Thus much time is uselessly lost in taking down the examinations and statements of the pleaders and the am-mookhtar, and nothing in fact is done. The defence in the case has been put forward, and yet the vakel does not know anything about the mortgage deed on which the claim is founded, which is a matter of great regret; he should be shameful of this. The person whom he brings before the Court as one who is acquainted with that subject appears to have not been acquainted with

it. This act cannot be considered proper on his part. It is the duty of the pleaders to acquaint themselves with the material facts of the case from their clients; in this case no attempt was made to know the same: this cannot be said to be anything but the fault of the pleader. Under the above circumstances, I think a further issue ought to be framed in this case, namely, whether the mortgage deed filed by the plaintiff is a genuine document?"

Very little regard appears to have been paid to the provisions of Act VIII of 1859. On the 29th of June 1872, the Subordinate Judge pronounced his decision. In that he said that the following points arose for decision in the case, namely:—

1. "Whether the notice of foreclosure was served on the defendant or not?"

2. "Whether the sum of Rs. 9,170, out of the payment made on the 9th October 1863, was credited on the account of the defendant's husband with the consent and permission of the defendant?"

3. "Whether the plaintiff's husband directed for the purchase of the dur-putnee mehal, and whether the Rs. 8,000 for which it was purchased should not be credited in the mortgage account?"

4. "Whether the stipulations regarding the payment of compound interest and recompense interest, as contained in the mortgage deed, were made with the knowledge and consent of the defendant; if not, can the deed be binding on her?"

5. "Whether any or what sum remained due upon the mortgage prior to foreclosure, which could entitle the plaintiff to seek for possession of the mortgaged estates upon declaration of her absolute title thereto?"

Having found that the service of the notice of foreclosure had been proved, he came to the merits.

The first question was whether a sum of Rs. 51,000 paid on the 9th of October 1863 was paid entirely on account of the mortgage, or Rs. 9,170, part of it, was paid on a different account. Upon this he decided that the Rs. 9,170 should be credited to the mortgage account.

The next question was as to a sum of Rs. 8,000 which he decided could not be credited in the mortgage account. He then said—"I now proceed to consider the principal point raised in the case, namely, as to whether the stipulations regarding compound interest and recompense interest contained in the mortgage deed will be binding on the defendant. The deed itself

"was put in question by the defendant's pleader, but its execution by the defendant has been satisfactorily proved, and its identity established by the admission of her own husband in this case. The question remains whether the defendant was aware of, and agreed to the said stipulations contained in the deed. She says stipulations were made by her, and that the only understanding was that the debt would carry simple interest at 15 per cent. per annum. The deed was drawn up in English at an attorney's office, and the executant was a Hindoo, purdanashin woman. Her husband, Prosonno Coomar Pal Chowdhry, was present at the time, and she acted with his advice; but Prosonno Coomar also was ignorant of the English language. It therefore lies on the plaintiff to show that the deed was properly explained to the defendant, and that she signed it with full knowledge of its conditions. Considering all the evidence and the circumstances of the case, I am clearly of opinion that these covenants in the deed regarding interest were not agreed to by the mortgagor, nor were they inserted in it with her knowledge or permission. Such covenants, therefore, cannot be equitably binding on her, and I hold it to be so in this case.

"It is doubtful whether a stipulation regarding compound interest in a deed of conditional sale is not against the spirit of the mofussil mortgage law; but I am clearly of opinion that a stipulation regarding recompense interest of the nature involved in this case is clearly against such law. The recompense interest clause runs thus:—The mortgagee shall consent to such sale or putnee grant and shall receive the consideration money thereof and apply the same in payment of the residue interest then due upon such amount up to the day of payment, and also additional interest thereon at the rate aforesaid for the period of six months then to come as a recompense to the said mortgagee, his heirs, executors or assigns, and shall apply the balance of the said consideration money in part or full (as the case may be) payment and satisfaction of the amount then remaining due upon these 'presents.' From this it is clear that the additional interest upon the principal then remaining due for a period of six months to come, was to be paid as a recompense to the mortgagee for receiving part payment of the debt prior to the date fixed in the deed for

"re-payment, namely, the 29th September 1862. I am of opinion that the mortgagee is bound by law to receive part payment of the debt before it falls due. Regulation I of 1798 expressly provides that the borrower who may be desirous to redeem his land by payment of the money lent upon it with any interest due thereupon within the stipulated period is at liberty on or before the date stipulated either to tender and pay to the lender the amount due to him, or to deposit the same in Court, &c. The stipulation regarding recompense interest is therefore most absurd and unreasonable. If the lender was bound to receive such money by law, he could not be entitled to a recompense for receiving it under a stipulation in the deed."

According to this view of the case the entire debt was satisfied before the foreclosure and he therefore dismissed the suit.

The plaintiff has appealed, and the defendant has objected to the finding that the notices of foreclosure were duly served.

There are therefore three questions to be determined:—

1. Were the notices duly served?
2. Was the mortgage deed explained to the defendant?
3. Is the whole sum of Rs 51,000 to be credited in the mortgage account?

Upon the first we see no reason for thinking that the decision of the Subordinate Judge is wrong. The witnesses if believed prove the service. It was not at first denied. The defendant in her written statement says she was not aware of the notice, but she has not been examined as a witness to prove this; and her husband, Prosonno Coomar Pal Chowdhry, who has been examined, does not say that he did not know of the notices being served.

The second is the main question in the suit. Mr Allan, formerly an attorney of the Supreme Court, and now a pleader of the High Court, says that in September 1860 he was a partner in the firm of Messrs. Allan Judge and Banerjee; was entrusted by Kistno Kishore Ghose to prepare a deed of mortgage from the defendant to him for Rs. 95,000. He accordingly prepared a deed, which was engrossed, and on the 29th of September 1860 he, accompanied by his then partner, Grish Chunder Banerjee, proceeded to the house of the defendant for the purpose of obtaining her signature to the deed. The lady having been identified to him by Prosonno Coomar Pal Chowdhry, understood to be her husband, put her

mark on the deed, and to the best of his recollection put her seal at the same time. Mr. Allan said that Grish Chunder Banerjee explained the contents of the deed to the defendant; but this was said on looking at the deed and not from any recollection of it. The deed appears to be executed by the defendant by her mark and to have a seal, and besides the attestation of the execution there is "explained by me, Grish Chunder Banerjee." Joykisto Gangopadhyaya, an attorney of this Court, and at that time a clerk to the firm of Allan Judge and Banerjee, said he attested the deed (he signed as Joykishen Gangooly) that Prosonno Coomar Pal Chowdhry identified his wife at the time, and he recollected that Grish Baboo, the attorney, explained the contents of that deed to the wife of Prosonno Baboo. He did not recollect in what manner "Grish Baboo" explained it or what explanation he gave. Grish Chunder Banerjee died in 1868, and the plaintiff could give no more direct evidence of the deed having been explained. The defendant, as I have said, has not given evidence. There is no excuse for her not having done so. She presented a petition to be examined by commission which was afterwards withdrawn, and we are without any account from her of what she was told about the deed before she executed it.

Prosonno Coomar said—"I became a subscribing witness of that document, and Bungshee Buddun Mitter became a subscribing witness. I do not recollect who else became a subscribing witness. I do not recollect whether I identified my wife, or whether she was identified by any one else. The said document was written in the English language. The attorney, Grish Chunder Banerjee, explained the contents of the same to my wife. I was present at that time. I do not recollect whether he read the document and explained the meaning of it. He explained it for ten or fifteen minutes. I did not see that document before that, nor was it explained to me. I do not know English. No one explained that document to me. The said Grish Baboo was my solicitor for preparing and explaining the said deed. I entrusted him with the care of preparing that deed. After preparing the said deed, he did not explain it to me, neither did I wish him to explain it. I had confidence in Grish Baboo, the attorney, therefore I did not take the pains of having it explained.

"No such term was written in the mortgage deed with my knowledge that after first deducting the amount of interest, which was become due, from the amount that would be received, Kristno Kishore Baboo would get six months' future interest on the remaining amount as damage. To my knowledge no such term was explained by Grish Baboo, the attorney, to Benode Mohinee at the time the deed was executed. To my knowledge the term of getting interest upon the amount of interest was not written in the deed, and the attorney, Grish Baboo, did not explain any such term to my wife."

The meaning of this is that the attorney, who is now dead, abused the confidence which was placed in him, and concealed from the witness and his wife the clause in the deed about the due payment of the interest. An application was made to us on behalf of the appellant to receive some further evidence on this matter, which it was said had been discovered after the appeal was filed in this Court. We were not satisfied that the plaintiff might not by the use of reasonable diligence have known the existence of this evidence before, but we thought that as there was a serious imputation against the attorney, and the issue whether the mortgage deed was a genuine document did not distinctly raise the question whether it was explained to the defendant, that question being first distinctly raised in the judgment of the Lower Court, we ought to receive any evidence that was offered which might help us to come to a satisfactory conclusion upon it.

A witness was called for the appellant, who said—"My name is Johannes Catchick Michael. I am the managing clerk of Mr. Hatch, one of the attorneys of this Court. I was also the managing clerk of Messrs. Hatch and Stewart. Messrs. Hatch and Stewart did act as attorneys of the late Baboo Rama Prosad Roy. I was acquainted with the late Baboo Kistno Kishore Ghose. I knew Baboos Bungshee Buddun Mitter and Prosonno Coomar Pal Chowdhry. When I was the managing clerk of Messrs. Hatch and Stewart, I did receive instructions relative to a deed of re-conveyance from Prosonno Coomar Pal Chowdhry and Bungshee Buddun Mitter. I did in consequence of such instructions prepare a deed of re-conveyance from Baboo Kistno Kishore to Benode Mohinee. The deed was afterwards executed. I am still the managing clerk of the firm of Mr. Hatch. I produce the deed of re-con-

"vee on behalf of Baboo Peary Mohun Roy, one of the sons of the late Baboo Rama Prosad Roy." [Witness here produces the deed dated the 9th October 1863]. Witness then looks at the end of the deed referred to and says:—"This deed was signed by Baboo Kistno Kishore Ghose in my presence. The witnesses are Gunga Narayan Sandyal and Prosonno Coomar Pal Chowdhry. I cannot read Bengalee. Their signatures are in Bengalee, but I remember both Prosonno Coomar and Gunga Narayan having signed the deed in my presence (B). This deed purports to be from Baboo Kistno Kishore Ghose to Benode Mohinee Chowdhraim. I had no interview with the lady. I received my instructions from Bungshee Buddun Mitter and Prosonno Coomar Pal Chowdhry. At the time they gave me instructions they said it was on behalf of Benode Mohinee, the wife of Prosonno Coomar Pal Chowdhry. I must have got the figures from Bungshee Buddun Mitter. He was the party who gave all informations. After the deed was executed by Baboo Kistno Kishore Ghose my recollection is that I brought it to my office as forming part of the title deeds of the Roys. I did cause a draft of the deed to be prepared. Bungshee Buddun Mitter took the draft. I remember it well. He took it to have it read by Baboo Kistno Kishore Ghose. This was what was stated to me at the time. Bungshee Buddun and Prosonno Coomar Pal Chowdhry came together and took it away. After it was returned by them it was engrossed and executed."

The vakeel for the respondent declined to cross-examine.

In answer to a question by the Court he said:—"The figures I alluded to above were read out by Bungshee Buddun Mitter in the presence of Prosonno Coomar Pal Chowdhry from a Bengalee paper."

The deed which the witness spoke of and which he produced shows that, at the time of its execution, October 1863, there remained due on the mortgage Rs. 55,000 for principal, and Rs. 24,000 for interest, when according to the defendant's account only Rs. 71,565 were due. This conduct of Prosonno Coomar shows that he understood that compound interest was payable, and that his statement that no such term was written in the mortgage deed with his knowledge is false. Bungshee Buddun Mitter, who is said by him to have given instructions to the attorney about the conditions to be written in the

document, said it was not settled in his presence that interest would be paid on the amount of former interest. This may be true, and yet it may have been agreed to, as he said he did not know what passed between the day when Kistno Kishore Ghose promised to advance the money and the day when the deed was executed. There is much reason for thinking that the real mortgagor and owner of the property was Prosonno Coomar himself, and that he only used his wife's name; and it would be sufficient if he knew the contents of the deed. But it is not necessary to treat the case in that way. If he knew how the interest was agreed to be paid, the attorney could have no reason for concealing it from the defendant; as Prosonno Coomar said he managed all the business relating to her properties, and the attorney might fairly suppose that she had agreed to it. The deed now produced also shows that of the Rs. 51,000 paid on the 9th of October 1863, only Rs. 41,880 were appropriated to the mortgage. The Judge ought to have allowed only this sum. The evidence of Prosonno Coomar upon this part of the case also is contradicted by the deed. As to what the Subordinate Judge calls recompense interest, there is nothing unreasonable in the mortgagee stipulating that, if the principal sum or part of it is paid off before the time fixed or without the requisite notice, six months' interest on it shall be paid. The mortgagee, if there had been no agreement to do so, would not have been bound to allow the mortgage to be paid off wholly or in part within the two years by selling the property, and he was entitled to make the payment of six months' interest a condition of his doing so.

The Subordinate Judge appears to think that Regulation I of 1798 entitles the mortgagor at any time after the mortgage to tender the principal sum with interest up to that time, and to have a redemption of the property. But the Regulation says (Section 5) that it is not intended to alter the terms of a contract settled between the parties (illegal interest excepted), and the contract here was to pay the principal sum on the 29th of September 1862, and in the meantime to pay interest thereon. The mortgagor could not have a partial redemption of the property under the Regulation, and when the mortgagee was agreeing to that he had a right to stipulate for the payment of the interest.

The Subordinate Judge found that the whole debt with simple interest was repaid before the 18th May 1868, leaving a balance

of about Rs. 338 in favor of the mortgagor. But if the compound interest is allowed, and the Rs. 8,170 are not brought into the mortgage account, there was a considerable balance then due to the mortgagee. The mortgage was therefore duly foreclosed, and the plaintiff is entitled to possession of the properties. The decree of the Court below must be reversed, and the plaintiff must have a decree for possession of the estates claimed in the suit with mesne profits thereof from the 18th of May 1868, and costs of the suit including this appeal.

The 25th August 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Decree of Ejectment—Stay of Execution.

Case No. 165 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Patna, dated the 8th May 1873.

Mahomed Hossein Khan and others
(Decree-holders) *Appellants,*

versus

Lootf Ali Khan (Judgment-debtor)
Respondent.

Mr. R. E. Twidale and Moonshee Mahomed Yusoof for Appellants.

Mr. C. Gregory and Moulvie Murhumut Hossein for Respondent.

The statement of a defendant that he has brought another suit for the purpose of getting his right to possession declared, is no reason for staying execution of a decree for ejectment.

Phear, J.—It does not appear to us that the Lower Court had jurisdiction to stay the execution in the way in which it has done. But even if it had jurisdiction we further think that its discretion was wrongly exercised. The decree which the Lower Court was called upon to execute was a decree of ejectment, and the ground upon which that Court thinks it right to stay execution is the statement made by the defendant that he has brought another suit for the purpose of

getting his right to possession declared. On the face of the statement it is clear that the defendant's right of suit was barred by the very decree which is sought to be executed. It seems to us no reason why the decree should not be executed as the judgment-creditor desires.

We cannot help saying that there are many facts of this case which would afford good reason to justify extraordinary diligence at this stage of the suit on the part of the judgment-creditor to get possession of the property.

We must set aside the order of the Lower Court and direct the execution to issue.

We allow two gold mohurs for costs.

The 25th August 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Limitation—Act VIII of 1859 s. 246.

Case No. 1660 of 1872.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 10th June 1872, affirming a decision of the Moonsiff of Saseeram, dated the 26th February 1872.

Kamessur Pershad (one of the Defendants)
Appellant,

versus

Kadir Khan (Plaintiff) and others (Defendants)
Respondents.

Baboos Chunder Madhub Ghose and Nil Madhub Sen for Appellant.

Mr. C. Gregory and Moonshee Mahomed Yusoof for Respondents.

Certain property having been mortgaged by BD to L, the mortgagee obtained a decree for its sale, had it sold in execution, and purchased it himself, subject to any right which certain parties (B and G) who had objected under Act VIII of 1859 s. 246, might be able to establish. After this L sold the property to plaintiff, who, not being able to get possession, brought a suit against defendants in whose hands some or all of the property seemed to be and who set up that they had purchased it from B, G, and BD:

Held that the suit was not barred, because it had not been instituted within twelve months of the date when the objections of B and G were allowed.

Phear, J.—IN this case it appears that one Bhyro Dyal mortgaged certain property to Luchmun Singh and another, and the

mortgage-debt not being re-paid, Luchmun Singh brought a suit to have the money realized by sale of the property. He obtained a decree, and put up the right title and interest of Bhyro Dyal for sale. At the sale he bought the property himself, and afterwards the present plaintiff bought it again from him. The plaintiff is not able to get possession of the property, which seems to have been, some or all of it, in the hands of Kamessur Pershad and others, who set up that they purchased it from Mussamut Bachee and Guneshee Singh, and also from Bhyro Dyal,—all these purchases bearing a date subsequent to the date of the mortgage made by Bhyro Dyal to Luchmun Singh.

Both the Courts have come to the opinion upon the facts of the case as established by the evidence that the plaintiff's title is made out;—in other words, that this property was the property of Bhyro Dyal; that it was mortgaged by him to Luchmun Singh; that a decree for sale of this property was obtained by Luchmun Singh; the sale had, a purchase made by Luchmun Singh himself; and then the sale by Luchmun Singh to the plaintiff.

The principal defendants now on special appeal make two principal objections to the decision of the Court below; first, that when the property was attached in execution of the decree which Luchmun Singh obtained on the mortgage bond, Mussamut Bachee and Guneshee Singh came in, and asserting that each of them had a 6 pie 12 krant share in the property, asked to have their respective shares excluded from the sale. And upon these objections the Court seems to have been of opinion that the allegation was made out, and passed an order to the effect that their shares should not be sold.

The defendant now says, first, that the result of this is to keep out of the sale, at which Luchmun Singh himself purchased, the 6 pie 12 krant belonging to each of these persons; that consequently these shares at any rate of the property which was the subject of mortgage did not pass to Luchmun Singh, and consequently again did not pass to the plaintiff. But it is also quite clear to us, indeed it is one of the objections raised by the defendant's pleader, that whatever was the order passed with regard to the exclusion of Mussamut Bachee and Guneshee Singh's share in the property, the whole of the right title and interest of Bhyro Dyal in the property was actually sold. The utmost therefore that could be the effect of this order excluding Mussamut Bachee and Guneshee Singh's share from the sale, would

be that Luchmun Singh, the judgment-creditor, being himself the purchaser, and therefore in his position of judgment-creditor necessarily privy to the proceedings which had taken place, took by his purchase Bhyro Dyal's property subject to any right which Mussamut Bachee and Guneshee Singh might be able to establish against it. In short, that he bought what Bhyro Dyal had professed to mortgage to him with notice of the claim which these persons made. Now when we look into the evidence to see what claim has been made out on behalf of these persons, we find, according to the view taken by each of the Lower Courts, that they failed to establish any right whatever. The first Court expressly finds that they made out no title, and the second Court confirms the decree of the first Court. It thus appears that, so far as this matter in contest is concerned, we cannot say here on special appeal that the decision of the Lower Court is wrong. The plaintiff has made out a title to all that Bhyro Dyal mortgaged subject to these persons' rights; but these persons have established no rights.

The second objection which has been put before us is that this suit is barred, because it was not in fact instituted within twelve months of the date when these objections of Mussamut Bachee and Guneshee Singh were allowed. It appears to us that this objection is put forward with some misapprehension of the real effect of Section 246. If in consequence of an objection made in pursuance of the provisions of that Section, any property has been released from attachment, and has been in consequence saved from sale in execution of the decree, the decree-holder cannot afterwards bring a fresh suit for the purpose of following and recovering that excluded property except within the limited time of twelve months. In this case the plaintiff is not pursuing anything which he did not get by virtue of the sale made to him in execution of his decree. He is seeking to realize that which he did get or obtain from his predecessors as a consequence of the sale held in execution of that decree. He bought the right title and interest of Bhyro Dyal, and it is that which he is seeking to recover. This is not a proceeding brought to bring something within reach of process of execution which was previously exempted from the operation of process of execution. Therefore it appears to us that the second objection also falls to the ground.

Accordingly we dismiss this appeal with costs.

The 26th August 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

*Execution—Limitation—Act VIII (B.C.) of
1869 s. 58.*

Case No. 154 of 1873.

*Miscellaneous Appeal from an order passed
by the Officiating Judge of Patna, dated
the 1st March 1873, affirming an order
of the Sudder Moonsiff of that district,
dated the 20th July 1872.*

Lalla Ram Sahoy (Decree-holder)
Appellant,

versus

Dodraj Mahto (Judgment-debtor) *Re-
spondent.*

Baboo Boodh Sen Singh for Appellant.

Baboo Anund Chunder Ghosal for
Respondent.

The holder of a rent decree having made application for attachment and sale within three years from the 3rd September 1868, the date of decree, attachment was effected and an order passed fixing 21st November 1871 as the date for sale. On consent of parties and part payment, postponement of sale was allowed for three months. After the lapse of this period the judgment-debtor delayed two months longer and then applied for sale. The application was refused :

Held that the judgment of the Lower Court was right, proceedings having been barred by Act VIII (B.C.) of 1869 s. 58.

Quære.—Had the Court any power, on consent of parties or otherwise, to extend the period of time prescribed by the statute of limitation?

Phear, J.—THIS was an application to the Moonsiff for an order for sale of certain property which had been attached in execution of a certain decree. The order, if made, would have been a process of execution.

The cause of action upon which the suit was brought was non-payment of rent, and the judgment was for a sum less than Rs. 500. The date of the decree was the 3rd September 1868, and the date of the application to the Moonsiff for this order of sale was 15th April 1872, so that an interval of much more than three years had elapsed between these two dates. Under these circumstances the Moonsiff held that Section 58 Act VIII (B.C.) of 1869 deprived him of the power of issuing the process which was asked for. The Section runs thus :—

“No process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of

“action mentioned in Sections 27, 28, 29, or 30 of this Act, after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding Rs. 500, in which case the period within which execution may be had shall be regulated by the general rules in force in respect to the period allowed for the execution of decrees of the Court.”

It is plain that under the circumstances of this case the prohibitory part of that Section operated. And if the words “shall be issued” are construed in the ordinary sense, they would no doubt have the effect which the Moonsiff has attributed to them.

Some elasticity, however, has been given to these words by a construction put upon them in a Full Bench decision which is reported in the XIII Weekly Reporter, Full Bench Rulings, page 4. And it is contended before us by the present appellant, the judgment-creditor, that the circumstances of the case are such as to bring it within the scope of the Full Bench decision.

It appears that the present appellant applied for attachment and sale on the 3rd May 1871, that is, at a time which was within the period of three years reckoning from the date of the decree. The attachment was effected and an order for sale was made upon this application; the sale was to take place on the 21st November 1871. But before the sale actually took place, namely, on the 18th November 1871, the judgment-debtor put in a petition for postponement; and by consent of parties, and upon a part payment of Rs. 18 being made, postponement of the sale, or at any rate time, was allowed for a period of three months. This period elapsed in February; but the judgment-creditor did not then make application to the Court, or do any thing to put the Court in motion. He waited until April, and on 15th April 1872 he made an application for sale, which was refused by the Moonsiff on the ground before mentioned.

The Lower Appellate Court upon appeal against this order of refusal upheld the Moonsiff's decision, and accordingly this special appeal has been presented to this Court.

These are the circumstances of the case before us. Now in the case wherein the Full Bench decision was given, an application for the attachment and sale of the property appears to have been made in due time; the property was attached at once. Thus far that case resembles the present one. But from the date when the property was attached until the 11th January 1869, the execution

proceedings in the Revenue Court were stayed by several orders made by the Court of the Sudder Ameen of the 24-Pergunnahs. As soon as those orders staying proceedings ceased to be operative, the judgment-creditor obtained an order for the sale of the property. And it was that order for sale of which the High Court was called upon to decide the validity. The matter came first before a Division Bench, and it was referred by the Division Bench to a Full Bench. The Full Bench by a majority of voices decided that on the facts which I have just now recited, the order of the Collector for sale of the property, though made after the period of three years had elapsed, was a valid order; and the Court discharged the rule which the judgment-debtor had obtained calling upon the judgment-creditor to show cause why that order for sale should not be set aside. It is perhaps worthy of remark that of the six Judges who heard that case, first in the Division Bench, then afterwards in the Full Bench, three were of opinion that the issuing of the process by the Collector was barred, and three were of opinion that it was not. So that although there was a majority in the Full Bench who thought the order ought to be upheld, there was an equality of voices between the two sides on the whole consideration of the case. And the Judges who sat on the Full Bench and constituted the majority do not agree in giving any definite explanation of the meaning which should be attached to the word "issue." They concurred in thinking that such a meaning ought to be given to it as would enable the order of the Collector to be validly issued; and upon that narrow ground they concurred in discharging the rule.

The Chief Justice in the course of his judgment said:—"In my opinion the word 'issue' should not have a strict literal interpretation put upon it. I should rather interpret it to mean sued out or applied for with success, that is, that no application for a process of execution shall be successful unless the application for it is made, or it is sued out, within a fixed time."

Mr. Justice Macpherson says that he concurs "in the answer which it is proposed by the learned Chief Justice to give to the question referred for decision; but it is impossible for me to say that I have not entertained considerable doubts upon the point." Lastly, he says:—"I think the language of the Section will bear the more reasonable construction put upon it by the Chief Justice and Mr. Justice Markby

"in the case of *Heera Lall Seal v. Poran Motteah* (VI Weekly Reporter, Act X, page 84); and that the words should be construed as meaning that execution shall not issue unless a proper application for execution has been made within three years from the date of the judgment."

And Mr. Justice Glover said:—"All that the decree-holder was by law bound to do was to apply for execution within three years: indeed that was all that he could do. Everything else was in the hands of the Court, and if the Court delayed the subsequent attachment for reasons of its own, the decree-holder ought not to be made responsible."

And in this passage, I think we have the clue to the interpretation which the majority of the Judges of the Full Bench desired to put upon the words of the Section. If the application for attachment and sale was made by the judgment-creditor within due time, and so far as he was concerned prosecuted with diligence and without delay, the Court appeared to think that the issuing of the process or warrant for sale ought to be considered as taking place on the date when the application was made; that if in short, there was nothing in the shape of delay on the part of the judgment-creditor,—if such delay as occurred was the fault or the act of the Court alone,—then the issuing of the process ought to be treated as a compliance with, a part and parcel of the application for it, *i.e.*, ought to be treated as the immediate consequence of the application. This appears to me to be the view which was taken by the Chief Justice when he said:—"I should interpret it to mean sued out or applied for with success."

Now giving this meaning or construction to the word "issue" as used in the Section, it seems to me clear that in the case which is before us we could not bring the order for sale, if the order had been made on the 15th April 1872, within three years. The proceedings were no doubt perfectly regular and unbroken from the time when the application was made in May 1871 up to November; and if the sale had taken place on the 21st November as it was at first upon this application, or in pursuance of this application, ordered that it should take place, then probably there would have occurred nothing which could have been reckoned as an infringement of the terms of Section 58. But in November the parties stayed the proceedings by consent. I do not myself think that such a stay of proceedings by consent would be a continuous

prosecution of them by the judgment-creditor within that which I take to be the principle upon which the High Court acted in the Full Bench decision. Possibly, however, the judgment-debtor might, so long as the consent stay of proceedings lasted, be estopped from asserting the contrary, though as to this I desire to express no judicial opinion, because I think it is a grave matter of doubt whether in any case parties can by consent get themselves free from, or remove the case out of, the operation of the statute of limitation. At any rate, however this may be, the consent stay of proceedings certainly came to an end in February, and the application was made in April. There was no foundation either in the shape of an estoppel or in anything which could be brought within the principle of the Full Bench decision for saying that the date of that application must be referred to the date of the original application for attachment and sale which was made in May 1871. I therefore think upon the whole, that the Lower Courts were quite right in holding that the process which was applied for by the judgment-creditor in April 1872 was barred from being issued by the effect of Section 58 of Act VIII (B.C.) of 1869, and therefore I think that this appeal should be dismissed with costs.

Morris, J.—The rule laid down by the Full Bench as the interpretation to be given to Section 58 of Act VIII (B.C.) of 1869, which corresponds with a Section of Act X of 1859, is that no application for a process of execution shall be successful unless the application for it is made, or it is sued out within a fixed time, that is, within three years from the date of judgment. In the present case, the application for an order of sale of the property under attachment bears date the 15th April 1872, or upwards of three years and seven months from the date of judgment. The only question, therefore, for consideration is whether this application must be treated as a separate application, or as being to all intents and purposes identical with the original application for attachment and sale by the judgment-creditor on the 3rd May 1871, which was admittedly within time. Strictly speaking, the action proper of the Court on the application of the 3rd May cannot be said to carry the application further than the 21st November following, on which date the property which had already been attached was ordered to be sold. But on that date a private arrangement between the judgment-creditor and judgment-debtor

to which the Court was asked to give its concurrence, and did give its concurrence, postponed the sale to the 24th February 1872.

As already pointed out by my learned brother, it is extremely doubtful whether upon consent of parties or otherwise the Court has any power to do this, because by so doing it took place upon itself to extend the period of time prescribed by the law of limitation. But apart from this, when the suspended proceedings were not revived and the sale did not take place on the 24th February 1872, it is clear that the application for sale made on the 15th April following involved the issue of a fresh process for execution, inasmuch as no notification having been made that the sale would take place on that date, it was incumbent on the Court to issue a proclamation specifying anew the time and place, &c., of sale in execution of the decree. It appears to me, therefore, that this application of April 15th, 1872, must be treated as a distinct application calling for the issue of a fresh process of execution. In this view, the judgment of the Lower Appellate Court, holding it to be beyond time and execution proceedings to be barred, was right and must be affirmed.

The 27th August 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

*Execution-sale—Bidder and Principal—
Act VIII of 1859 s. 25.*

Case No. 1 of 1873.

Appeal under Section 15 of the Letters Patent against the judgment of the Hon'ble Justices J. B. Phear and W. Ainslie, dated the 19th May 1873, in Miscellaneous Appeal, No. 53 of 1873, the said Judges having been equally divided in opinion.*

Baboo Huree Ram and another (Decree-holders) *Appellants*,

versus

Hur Pershad Singh (Opposite Party) *Respondent*.

Baboo Ashootosh Dhur for Appellants.

No one for Respondent.

Held (confirming the judgment of Phear, J.) that the party purchasing at an execution sale under the

* *Ante*, p. 80.

- Civil Procedure Code, in the character of an agent, cannot be made liable as a principal: and a proceeding upon the contract under s. 254 in such a case must be taken against the principal.

Couch, C.J.—WE think the decision of Mr. Justice Phear is correct. Hur Pershad was known to be a mookhtear at the time he was bidding and whether at that time he stated that he was making the bidding for Deoranee Kooer or not, it was so entered in the sale-sheet, and he was allowed to sign it as "mookhtear purchased for Mussamut Deoranee Kooer." I think, it cannot, under such circumstances, be said that he was purchasing as a principal, and that this was merely his description. The appellant cannot say that he was buying as a principal, and gave as his description that he was mookhtear purchasing for a certain person. It was stating the character in which he made the purchase, namely, as agent. He cannot be made liable on the contract as a principal, it being made by him as an agent. If he had not authority from her to make the purchase, he may be made liable on the ground either that he falsely represented himself as having an authority which he had not, or that by purchasing in this way he undertook that he had authority. He would be liable either for a breach of contract, or for a false representation; but a proceeding upon the contract under Section 254 of Act VIII of 1859, such as this is, must be taken against the party who was the principal in the contract, namely, the person for whom Hur Pershad made the bidding. The appeal must be dismissed with costs.

Jackson, J.—I concur. I would only add that the question whether the Judge had sufficient ground for accepting the bidding as made on behalf of Deoranee Kooer does not seem to me to arise in this case, and that the grounds upon which, as observed by the learned Chief Justice, his liability as an agent might arise, are grounds which could not be disposed of by summary application under the Section.

Mitter, J.—I concur.

Couch, C.J.—This decision must not be understood as in any way deciding that an appeal will lie in such a case as this. It has not been necessary for us to determine that.

The 27th August 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Intermediate Tenancy—Adverse Possession—
Presumption—Cause of Action.*

Case No. 16 of 1873.

*Special Appeal from a decision passed by
the Judge of Beerbhoom, dated the 2nd
September 1872, reversing a decision of
the Subordinate Judge of that district,
dated the 28th December 1871.*

Bungsrāj Bhookta Ghatwāl (Plaintiff)

Appellant,

versus

Mohunt Megh Lāl Pooree Gossain and
others (Defendants) *Respondents.*

*Baboos Sreenath Dass and Mohinee
Mohun Roy for Appellant.*

Baboo Nil Madhub Sen for Respondents.

Where A holds under B's tenant his possession is not adverse to B, and if he continues to hold the presumption is, until the contrary is shown, that he holds as he held before. Should A set up a title to any portion of the property and obtain a decree against B's alleged tenant, this would give B a cause of action against A.

Markby, J.—THE suit out of which this appeal arises relates to 91 beegahs of land, which the plaintiff says is Mouzah Korwa and also called by another name, and forms a portion of his ghatwallee tenure. It appears that a person named Choorā Roy, who is also a defendant, is in possession of 4 beegahs out of 91; and that he had also brought a suit against one other person Bhunjun Mohata in respect of the rent of 6 other beegahs, alleging that Bhunjun is his tenant, he himself claiming to hold under the defendant No. 1. The present suit is now brought by the plaintiff to have his whole title declared in the 91 beegahs, and to recover possession of 4 beegahs.

One of the questions raised in the first Court was that the plaintiff's suit had been instituted against different persons under different causes of action. But it was held that the suit was brought by the plaintiff in respect of one and the same property; in other words, that the title which the plaintiff set up was a single title to the whole property which he was seeking to establish against different persons. The first Court gave the plaintiff a decree declaring his title to the whole of the property, and also for possession of the 4 beegahs. Although there is some obscurity in the decree, we think it was against the defendants generally; and the defendant No. 1, who is the landlord of the defendant No. 2 and who apparently was mainly instrumental in defending the suit, was ordered to pay costs.

Upon appeal by the defendant No. 1, the District Judge held that, as against that defendant, no cause of action was disclosed in the plaint; but he also went on to hold as regards the 4 beegahs that the adverse title of holding for more than twelve years by Choora Roy was established, and the result was that he reversed the whole decree of the Subordinate Judge, and dismissed the whole suit as against both the defendants.

Now, as regards the question whether or no there was a cause of action, it is perfectly clear that there was a very good cause of action as against Choora Roy. Choora Roy set up a title to a portion of this property, and has actually recovered a decree against the person whom the plaintiff alleges to be his tenant, and who admits himself to be the plaintiff's tenant. It is true that Choora Roy has not yet executed that decree, but there cannot be the least doubt if this suit fails that he will do so. It is not reasonable to suppose that the plaintiff's tenant, although he is perfectly willing to acknowledge his landlord's title, will continue to do so unless the plaintiff can establish his title against adverse claimants. Therefore it is perfectly clear that, as against Choora Roy, the plaintiff has been disturbed in his possession of the property, and has a right to a decree which will enable him to recover rent as against his tenant.

Then the other question is whether the plaint also discloses a good cause of action as against the first defendant. Now, it is only a matter of prudence on the part of the plaintiff to join the defendant No. 1 in this suit. If the defendant No. 1 had stated, I do not claim Choora Roy as my tenant and I do not recognize his acts, the suit would

have been dismissed as against him, and the plaintiff would have to pay his costs. But it has now turned out that it is the first defendant who has put forward Choora Roy and maintained Choora Roy's title; therefore the plaintiff was perfectly right to join him, in order to get a decree which would establish his title, not only as against Choora Roy, but as against the first defendant also. It seems to us, therefore, that that objection entirely fails.

Then as regards the question of limitation, the only interpretation which we can put upon the Judge's judgment is that, assuming the facts as stated in the plaint to be true, there is nothing to show that the possession of Choora Roy was not adverse to the plaintiff. Now it appears to us that, if the facts as stated in the plaint are true, the right inference would be that Choora Roy's possession was not adverse to the plaintiff, because he originally held the land under the plaintiff's tenant Lukhun Mohatta, and therefore so long as Choora Roy held under Lukhun Mohatta, there was no adverse possession. Then came the period from 1258 to 1265 during which it does not appear whether or no any person intervened between Choora Roy and the plaintiff. But whether there was or was not an intermediate tenant, or whether the rent was paid to the plaintiff himself, the presumption is, until the contrary is shown, that Choora Roy continued to hold as he had before under the plaintiff. Then in 1265, as the Judge says, the possession became adverse, but that is within twelve years before the institution of the suit.

The result will be that the decision of the Lower Appellate Court will be set aside and the case will be remanded for re-trial. The Judge will consider the general question whether there was sufficient reason for disturbing the decision of the Subordinate Judge which declares the plaintiff's title. Then, having done that, he will consider the other question, namely, whether, notwithstanding the plaintiff's general title, this title is as to those 4 beegahs barred by the law of limitation.

Costs of the remand will abide the ultimate result.

The 27th August 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Rent Suit—Putnee Pottah.

Case No. 1673 of 1872.

*Special Appeal from a decision passed by
the Judge of Midnapore, dated the 8th
August 1872, reversing a decision of
the Officiating Subordinate Judge of that
district, dated the 12th May 1871.*

Dhunendro Chunder Mookerjee (Plaintiff)
Appellant,

versus

Mr. John Watson Laidlay and others
(Defendants) *Respondents.*

*Mr. J. W. Lowe and Baboo Dinonath Bose
for Appellant.*

*The Advocate-General and Mr. R. T. Allan
and Baboo Mohinee Mohun Roy for
Respondents.*

A plaintiff is entitled to maintain a suit for rent where he bases his cause of action on the putnee pottah held and admitted by the defendants.

Markby, J.—It seems to us that the plaintiff in this suit, who is the appellant before us, is entitled to a decree. The suit is for rent, and it is brought upon a plaint which, on two distinct occasions, refers to the putnee pottah and the putnee jumma as admitted by the defendants. The plaintiff asks the defendants to produce their putnee pottah which he says would show their admitted putnee jumma, he not being able to produce his kubooleut which has been filed in another suit. The Subordinate Judge says that before him the plaintiff did not deny that the putnee pottah was given; and the Lower Appellate Court says that the plaintiff sufficiently admits the putnee tenancy of the defendants,—and Mr. Lowe here has

stated that his client adopts the putnee; that he sues upon it; and that the Court below has erred in saying on the review that he did not do so. Under these circumstances, it seems to us perfectly clear that the putnee pottah is the foundation of this suit, and it is upon that and upon that alone that the plaintiff bases his cause of action. This, it seems to us, entirely distinguishes this case from that which has been referred to in the 17th Weekly Reporter, page 494, and upon the basis of which the Judge admitted the review, because there the learned Judge, Mr. Justice Glover, says that the plaintiff does not sue for his putnee rent, and Mr. Justice Kemp says after having observed that the plaintiff ought to bring his suit upon his putnee pottah, that he has not done so. Here it is quite clear that the suit was brought upon the putnee pottah, and upon no other ground whatever.

For these reasons, we think that the District Judge was right in his first decision, and we think that he has been led into the error of granting the review by considering this question rather upon the strict language of the plaint than upon the way in which the case has been put by the parties themselves. It was perfectly natural on the part of the plaintiff when he brought this suit to avoid as far as possible making any admission which would prejudice him in the other suit. But this is a question with which we have absolutely nothing to do. The only question upon which we are called upon to express our opinion is whether the plaintiff is entitled to maintain this suit against the defendants, and we think he is. We entirely agree with those learned Judges who decided the case reported in the 17th Weekly Reporter, that the plaintiff must sue upon his putnee pottah; and we are also of opinion that in this case he has done so, and therefore he is entitled to his decree.

The result is that the decree of the District Judge in review will be reversed, and the original decree of the Subordinate Judge restored and affirmed. We think that, under all the circumstances, each party must pay his own costs in this Court.

The 27th August 1873.

Present :

The Hon'ble F. A. Glover, *Judge.*

Act VIII of 1859 s. 97—Review.

Case No. 453 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 25th November 1872, affirming a decision of the Sudder Moonsiff of that district, dated the 31st August 1872.

Pearee Mohun Dutt (Plaintiff) *Appellant,*
versus

Gooroodoss Dutt (Defendant) *Respondent.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Grija Sunkur Mojoomdar for
Respondent.

A plaintiff having, under Act VIII of 1859 s. 97, asked leave to withdraw his suit with permission to bring a fresh suit, the Moonsiff granted the prayer; but the permission to bring a fresh suit was, through inadvertence, not recorded on the petition. Subsequently the Moonsiff made an order giving plaintiff this permission:

Held, that there was nothing to prevent the passing of such an order, which was in the nature of a review of the original order, and declared that it was the Moonsiff's intention to give the permission, which intention had not been expressed through inadvertence.

Glover, J.—THE point for decision in this special appeal is whether the plaintiff's suit is barred by reason of Section 97 of the Civil Procedure Code.

It appears that the plaintiff, who was one of several suitors, on the 3rd of April 1871, put in a petition asking to be allowed to withdraw his suit, and, as he says, to have permission given to him to bring a fresh suit. On the 16th August 1871, this permission appears to have been granted. The question now is, and it is that on which both the Lower Courts have decided the case, whether the permission of the 16th of August was sufficient under the law to enable the plaintiff to bring a fresh suit.

It is contended that it is not sufficient, inasmuch as both orders should have been given at one and the same time, and if not so given cannot be given at all.

If there was nothing else in the case, I think, the Judge would have been right. But it appears from an authenticated copy of the order of the Moonsiff (who by the way is the same officer who passed the order of the 3rd April), that the plaintiff did in his original petition asking leave to withdraw his suit, likewise ask for permission to bring a fresh suit, and that that permission was not recorded on the petition through inadver-

tence; and the Moonsiff thereupon makes an order giving plaintiff the permission.

This was an order, as I understand it, in the nature of a review of the original order of the 3rd April 1871, and there was nothing to prevent the passing of such an order.

If the Moonsiff was correct as to the prayer of the original petition, what he did was to declare that, on the 3rd April 1871, he did intend to give the plaintiff permission to bring a fresh suit, but that this part of his order had been omitted through inadvertence. That being so, there is no doubt that the plaintiff, when he brought his present suit, was not barred by Section 97.

Another objection is taken into which however it is not necessary to enter. It is to the effect that the ground on which the present suit is brought is not the same as that on which the previous suit proceeded. As the first point has been decided in favour of the special appellant, it is not necessary to say more than that the two suits were in my opinion substantially for the same matter.

The case is remanded to the Moonsiff for re-trial. Costs will follow the result.

The 28th August 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.; Chief Justice,* and the Hon'ble F. A. Glover, *Judge.*

Issues—Appellate Court.

Case No. 1500 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 12th June 1872, reversing a decision of the Moonsiff of that district, dated the 9th March 1872.

Mahomed Rasid Khan Chowdhry
(Plaintiff) *Appellant,*

versus

Jadoo Mirdha (Defendant) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.
No one for Respondent.

A suit to recover possession of land in the wrongful possession of defendant having been decreed by the first Court, the decision was reversed by the Lower Appellate Court because it did not appear that there had been any demand of possession:

Held that, before deciding the case in this way, the Lower Appellate Court ought to have framed an issue as to whether there had been a demand of possession.

Couch, C.J.—THE plaintiff brought a suit to recover possession of land from the

defendant, which he alleged the defendant was wrongfully in possession of.

The defendant pleaded a right to hold the land under what he said was an *amulnamah*, or deed of possession, given to him by the plaintiff's tehsildar.

The Moonsiff found against the defendant, and decreed that the plaintiff should have possession.

Upon appeal, the Subordinate Judge has reversed that decree, and has dismissed the plaintiff's suit on the ground that the plaintiff had not served upon the defendant, before he brought the suit, any notice to quit or demand of possession.

The defendant did not in the first Court insist upon the want of any demand of possession; in fact, his defence is of such a nature that he would not be likely to do so. Although he did not insist upon it, the plaintiff may not be entitled to recover possession without showing that he had first demanded it of the defendant. But the Subordinate Judge ought not to have reversed the Moonsiff's decree because it did not appear that there had been any demand of possession. No issue had been framed upon that question, and the plaintiff had had no notice that he would be required to prove it. What the Subordinate Judge ought to have done before deciding the suit in this way, was to frame an issue as to whether there was a demand of possession, so as to give the plaintiff an opportunity of proving it, if there had been one; and, if there were not other circumstances, we should have to remand the suit to have that question tried. But the defendant will not be prejudiced by our not remanding the suit and reversing the decree of the Subordinate Judge; for it appears that he has no title to hold the property except as a tenant-at-will, and the suit which was instituted more than a year ago would be a demand of possession at that time. If, as is now proposed, the decree is only for ejecting him at the commencement of the next Bengalee year, he will have had ample notice that he is to quit the premises, and he will not be prejudiced by our making such a decree. It will be better for him that the decree should be in that form than that we should remand the case in order to have the question tried whether he received notice or not.

Therefore we reverse the decree of the Subordinate Judge, and give the plaintiff a decree to recover possession of the land, but such decree is not to be executed until the commencement of the next Bengalee year. We make no order as to costs.

The 28th August 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Special Appeals—Ex parte Decisions—Declaratory Suit—Possession.

Case No. 1291 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 31st May 1872, reversing a decision of the Moonsiff of Kytee, dated the 17th April 1871.

Paran Chunder Ghose and others (Plaintiffs)
Appellants,

versus

Chukkun Lall Roy and others (Defendants)
Respondents.

Baboo Taruck Nath Sen for Appellants.

*Baboos Anund Chunder Ghosal and
Rash Behary Ghose for Respondents.*

HELD (in concurrence with the decision reported in X W. R., p. 450) that a special appeal lies from an *ex parte* decision passed by an Appellate Court in regular appeal.

Where there has been a clear dispute as to title, a suit for declaration of title is maintainable whether plaintiffs have been disturbed or not in their possession.

Markby, J.—IN this case, which is good deal complicated, it appears that in the year 1868 one Ram Bharut Pal obtained a decree against Paran Chunder, Bhoot Nath, and Mongula Dossee, for possession of certain property, and that decree was, as against Paran Chunder and Bhoot Nath, who seemed to be the persons principally interested in the transaction, an *ex parte* decree. Immediately afterwards and before any steps were taken to execute that decree, Paran Chunder, Bhoot Nath, and another person, named Raj Chunder, brought a suit in respect of the same property against Rajessuree Debin, Chukkun Lall Roy, Shoshee Bhoosun Roy, Mongula Dossee, Bahadoor Ghose, and Tej Chunder Ghose; and subsequently Ram Bharut Pal came in of his own accord and asked to be made a defendant in that suit. The suit was first disposed of on the ground that the claim of the plaintiff was barred by limitation; but that decision was reversed by the Subordinate Judge. Then, on remand, the suit was again dismissed on the ground that the claim of the plaintiff was barred by Section 2 Act VIII of 1859. But that

decision was also reversed by the Subordinate Judge, and the case was remanded for trial generally between the plaintiffs and defendants. Thereupon, the Moonsiff tried the case on the merits, and, having gone into the evidence, has held that the plaintiffs are the owners of this property; that they have made out their case that this is debutter property and that they are entitled to it; and has given them a decree accordingly. Upon the case coming up by appeal before the Subordinate Judge, he has dismissed the whole suit. Now the case comes up to us in special appeal against the decision of the Subordinate Judge.

In regard to the question whether an appeal lies, the appeal having been heard below *ex parte*, it is sufficient for us to say that we agree with the decision of this Court reported in the 10th Weekly Reporter, page 450, and the decision in the 6th Bombay Reports, page 169; and that we differ from the decision in the 3rd Madras Reports, page 109.

Now the appellants appeal upon a ground which appears to us to be not well-founded. They appear to have thought that the Subordinate Judge dismissed the suit on the ground that it was barred by Section 2 Act VIII of 1859, reversing his own former decision. But we are satisfied that that was not the ground of his judgment. That part of his decision is only the recital of his former judgment which he still adheres to; and the ground of his decision is that, inasmuch as he finds that the plaintiffs, all three of them, are in possession of the property, the suit for declaration of their title cannot be maintained, and therefore he dismissed the suit.

Now, after all the litigations that had taken place, it was certainly somewhat late for the Subordinate Judge to take that view of the matter, and we are quite satisfied that there was ample ground for a suit being brought in this case for a declaration of the plaintiffs' title. Whether or no the plaintiffs were disturbed in possession, there was a clear dispute as to the title which ought to be settled. Therefore, the ground upon which the judgment of the Subordinate Judge proceeds cannot be supported.

But then the respondent in the cross-appeal has taken an objection which he is at liberty to take, that the former decision of the Subordinate Judge reversing the judgment of the Moonsiff, and holding that the suit is not barred by Section 2 Act VIII of 1859, is at any rate as regards Paran Chunder and

Bhoot Nath a wrong decision in point of law; that in fact these two persons having been defendants in the former suit brought by Ram Bharut Pal, that decision is conclusive as against them; and that they are not entitled to this property. Now, we are very far from saying that this is a question which is altogether free from difficulty, and in truth the facts upon which that question is to be determined are very imperfectly before us; but, upon the whole, we do not see sufficient reason to reverse the decision of the Subordinate Judge who held that that former *ex parte* decree was not conclusive.

We think, under all the circumstances of this case, that the law does not require us to do that which we should be very unwilling to do, namely, to say that this suit should not be decided, as the Moonsiff has decided it, upon its merits. The decision of the Subordinate Judge will, therefore, be reversed, and the case must go back to the Subordinate Judge, and he will consider the appeal upon the merits. If he sees any reason to differ upon the merits of the case from the Moonsiff, of course he will dismiss the suit; but if he agrees with the Moonsiff in his decision upon the merits of the case, then he will declare as against *all the defendants* in the suit, including Ram Bharut, that the title of the plaintiff to the property in dispute is established. Costs of the remand will abide the ultimate result.

The 29th August 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Appellate Court—Grounds of Decision—
Remands.*

Case No. 24 of 1873.

*Special Appeal from a decision passed by
the Judge of West Burdwan, dated the
2nd September 1872, reversing a decision
of the Moonsiff of Radhanuggur, dated
the 6th January 1872.*

Kristo Chunder Chuckerbutty and others
(Plaintiffs) *Appellants,*

versus

Ram Brohmo Chuckerbutty and others
(Defendants) *Respondents.*

*Baboo Rash Beharee Ghose for Appellants.
Baboo Gopal Lall Mitter for Respondents.*

It is the duty of the Appellate Court, when it reverses the decision of the first Court, and more especially when the judgment of the first Court is full and cogent, to

point out the grounds on which it comes to a different conclusion. Where a District Judge had omitted to do so, and having left the country could not be required to supply the omission, the High Court being unable to make the ordinary presumption that he had fully considered the evidence, set aside his judgment, and remanded the case to be heard in appeal *de novo*.

Markby, J.—THIS was a suit brought to recover possession of land. The defendants disputed the plaintiff's title and denied that he was in possession within twelve years; in other words, they pleaded limitation. The evidence was partly documentary and partly oral. The Moonsiff delivered a judgment, which shows that he had tried the case with very great care and attention, and he gives reasons for his judgment which, on the face of them, are, we think, worthy of very great consideration. The case went before the District Judge, and he commences his judgment by some observations upon the documentary evidence, which he says establishes that there was, as the plaintiff alleged, some lakheraj land within the mouzah, but he does not go on to determine whether or no that is the lakheraj land now claimed by the plaintiff. He then goes on to observe that the only evidence that can prevent limitation barring this suit is the oral evidence of the plaintiff's witnesses; and he disposes of that evidence by the simple observation that the evidence of the plaintiff's witnesses is not good and does not prove the possession of plaintiff.

Now, although it is perfectly clear upon the decisions of this Court that the omission of a Judge to state fully his reasons for coming to his conclusion is not a ground of special appeal, it has been often pointed out, what is indeed perfectly obvious, that it is the duty of the Appellate Court when it reverses the decision of the first Court, and more especially when the judgment of the first Court is full and cogent as it is here, to point out the grounds upon which it comes to a different conclusion; and we think it certainly cannot be too distinctly understood that a Judge fails to perform his duty who omits to do so; and the course that we should have taken would have been to send the case back to the District Judge and require him to state his reasons fully. But this, in the present case, we are unable to do as the District Judge has left the country. We think, therefore, that we are bound to treat this as an exceptional case, and we are unable to make that presumption here which in other cases we should certainly make that the Judge had fully considered the evidence and had done his duty in the Court of Appeal.

Unless we have something better than that which is now before us to answer the judgment of the first Court, it is impossible to make that presumption; and as we have no means of obtaining any further information than what is before us, we think we have no other course than to set aside the judgment of the District Judge as wholly insufficient, and remand the case to be heard in appeal *de novo*.

As we have already said, the course we have taken in this case is an exceptional one, and we ought not to saddle the respondent with the costs of this hearing. We think each party ought to pay his own costs in this Court.

The 1st September 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Enhancement of Rent—Form of Notice—Specification of Holdings.

Case No. 963 of 1873.

Special Appeal from a decision passed by the Officiating Judge of the 24-Pergunnahs, dated the 14th April 1873, reversing a decision of the Second Moonsiff of Diamond Harbour, dated the 17th September 1872.

Dwarkanath Haldar and another (Defendants)
Appellants,

versus

Huree Mohun Roy and another (Plaintiffs)
Respondents.

Baboo Nil Madhub Sen for Appellants.

The Advocate-General and Baboo Ashootosh Dhur for Respondents.

A notice of enhancement ought to state distinctly the several holdings the rent of which is sought to be enhanced, the amount of enhanced rent that the tenant

is liable to pay for each, and the grounds of the claim in each instance.

If a suit for enhancement is decreed where the notice, though embracing several holdings, was not in that form, the defendant is entitled to have specified what the enhanced rent for each holding is, so that he may be able to relinquish any one of them and retain the others.

Couch, C.J.—WE agree in what is stated in the decision* quoted from the Revenue, Criminal, and Civil Reporter, that the notice ought to state distinctly the several holdings in the possession of the defendant, and the amount of the enhanced rent that he is liable to pay for each of them, and the grounds upon which the enhancement is claimed in each particular instance. But the objection was not taken in the first Court, nor in the Appellate Court; and we think therefore that the suit ought not to be dismissed now on the ground that the notice is not in that form. When the case comes to be determined by the Lower Courts, the defendant is entitled to have specified, if the decision goes against him, what the enhanced rent for each holding is, so that he would be able, if he thought fit, to relinquish any one of the holdings and retain the others. If a decree should be made merely allowing one entire sum as the enhanced rent of all these holdings, we think it would be erroneous, and there would be a ground for the defendant coming to this Court to have it set aside. But if the Court deals properly with the case upon this notice, the defendant need not be prejudiced by the form of it. If the objection had been taken in the first Court, we think it would have been right to allow the plaintiff to withdraw the suit and to give a fresh notice. But we do not think we ought to dismiss the suit at this stage. And in this case the question arose in quite a different way from that in the case we have referred to. There the Lower Court had dismissed the suit, and the appellant was insisting in this Court that he was entitled to have a decree for the enhanced rent in the one sum, which, as we have said, he was not entitled to. Therefore, we think we must dismiss the present appeal, allowing the costs of it to follow the result of the suit, and we hope that what we have said will guide the Lower Courts sufficiently to prevent the case coming up to us again.

* 8 W. R., 252.

The 1st September 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Stamps—Copies of Decree and Judgment—Act VIII of 1859 s. 198—Delay.

Application for admission of a Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 7th May 1873, affirming a decision of the Assistant Commissioner of Mambhoom, dated the 13th January 1873.

Rajah Nil Monee Singh Deo (Plaintiff)
Appellant,

versus

Chinibas Mahanti and others (Defendants)
Respondents.

Baboo Bhowanee Churn Dutt for
Appellant.

No one for Respondents.

When stamps are put in by a party to the suit as required by Act VIII of 1859 s. 198, a copy of the decree and judgment must be furnished to him without further costs. A District Judge is not justified in delaying the giving of the copy until blank papers are put in by the applicant.

Markby, J.—WE think that this appeal must be admitted. There appears to have been some delay in delivering out the copy of the decree and of the judgment, owing to the appellant not having put in a sufficient quantity of blank papers required for copies. But, in point of law, the Judicial Commissioner was not justified in delaying the giving of the copies until the blank papers were put in by the applicant; because Section 198 of Act VIII of 1859 requires that certified copies of the decree and judgment shall be furnished to the parties on the production of the necessary stamps; and by a Resolution* of this Court, dated the 6th July 1872, which has been circulated to the District Judges and Judicial Commissioners,

* Letter No. 1830, from the Registrar of the High Court of Judicature at Fort William in Bengal, to the Officiating Judge of the 24-Pergunnahs,—dated Calcutta, the 6th July 1872.

CIVIL SIDE.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble W. Markby, F. A. Glover, and W. Ainslie, *Judges.*

SIR,

I AM directed to acknowledge the receipt of your letter No. 405, dated the 27th May last, wherein you solicit

• it is pointed out that when stamps are put in by a party to the suit as required by Section 198, a copy of the decree and judgment must be furnished to him without further costs. It was clearly the intention of the Legislature that the stamp should cover all the costs of giving the copies asked for. The result is that the delay was entirely owing to the act of the Court, and not to the default of the appellant.

The appeal must be admitted.

The 1st September 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Assignee — Execution ultra vires — Judgment-debtor's remedy.

Case No. 1881 of 1872.

Special Appeal from a decision passed by the Judge of Sarun, dated the 28th August 1872, reversing a decision of the Subordinate Judge of that district, dated the 21st July 1871.

Ram Gobind Singh and another (Defendants)
Appellants,

versus

Gheenoo Singh (Plaintiff) *Respondent.*

a reconsideration of the provision of C. O. No. 178, dated 13th May 1861, which prohibits any charge being made for copies of decrees or judgments required by parties to a suit.

2. I am to inform you in reply, that the Court have no power to declare that copies of judgments shall, as far as the parties to the suit are concerned, be charged for. The law (Section 198, Act VIII of 1859) requires certified copies of decrees and judgments to be furnished to parties on the production of the necessary stamps. When, therefore, such stamps are put in by a party to the suit, a copy of the decree and judgment must be furnished to him without further cost.

3. With regard to your remark as to few, if any, of the old class of office mohurrirs in Moonsiffs' Courts knowing English, the Court observe that, if this is so, you should in future withhold your approval under Section 86 of the Civil Courts' Act, if the Moonsiff should propose any establishment on which there was not at least one mohurrir who knew English. If, in the meantime, copies of decrees and judgments cannot be made at the Chowkeys, they must be sent into the Judge's Office to be made there.

I have, &c.,
(Sd.) F. B. PRACOCK,
Registrar.

Circular Memo. No. 13.

CIVIL SIDE.

Present: The Hon'ble F. A. Glover, Judge.

Copy forwarded to all District Judges and Judicial Commissioners for their information and guidance.

By order of the High Court,

HIGH COURT, } (Sd.) W. CORNELL,
The 27th July 1872. } *Officiating Registrar.*

Baboo Mohesh Chunder Chowdhry for
Appellants.

Baboos Romesh Chunder Mitter, Chunder
Madhub Ghose, and Judoonath Sahoy
for Respondent.

The assignee of a decree having obtained execution of it in the Deputy Collector's Court under cover of a declaratory and mandatory decree of the Civil Court, which latter decree was set aside in appeal, a suit was brought against the assignee to recover the money which he had obtained by means of the execution proceedings :

Held that the judgment-debtor or his representative (plaintiff) had no title to recover the money, unless he could show that he had been in some way defrauded by the transaction; the proceeding of the Deputy Collector giving him no cause of action by the mere fact of having been *ultra vires*, or not done in full exercise of judicial discretion.

Phear, J.—THE material facts of this case, so far as it is necessary to mention them, seem to be as follows:—In September 1861, one Ruchen Roy and others obtained a decree in the Collector's Court against Owdas Koomar and others. There was cross litigation after this, and in April 1863 Owdas Koomar and others obtained a decree against Ruchen Roy and others in the Court of the Principal Sudder Ameen. In August 1863, at which time this decree in favor of Ruchen Roy still remained unsatisfied, the judgment-creditor sold it to Ram Gobind and another. After Ram Gobind got this assignment of the decree, he applied to the Deputy Collector for execution, and the Deputy Collector refused it. Thereupon Ram Gobind went to the Civil Court and obtained a decree against Owdas Koomar and others declaratory of his right to obtain execution of Ruchen Roy's decree, together with an order to that effect upon the Deputy Collector. An appeal against this decision of the Civil Court was preferred to the High Court. But, pending the appeal, Ram Gobind went with the declaratory decree which he had obtained to the Deputy Collector, and under its force or authority the Deputy Collector gave him execution of Ruchen Roy's decree against Owdas Koomar. Owdas

Koomar, in consequence of proceedings thus taken in execution of the decree, paid the amount of it to Ram Gobind, and Ruchen Roy's decree thereby apparently became satisfied. After this took place, the appeal which Owdas Koomar had preferred against the Civil Court's declaratory decree in favor of Ram Gobind was successful, and that decree was set aside. But of course the matter of the execution in the Collector's Court was left untouched as it stood. Owdas Koomar, however, complains that the execution which Ram Gobind obtained from him in the Deputy Collector's Court under cover of the declaratory and mandatory decree of the Civil Court became wrongful when that decree of the Civil Court was set aside by the superior Court, and on this ground he considers that he had a right of suit against Ram Gobind to recover the money which Ram Gobind had obtained from him by means of the execution proceedings in the Deputy Collector's Court. And having this right, it is said that he assigned it to the present plaintiff, and accordingly the present plaintiff brings this suit against Ram Gobind upon the foundation of Owdas Koomar's right to recover back the money which Ram Gobind obtained from Owdas Koomar by means of the execution proceedings in the Deputy Collector's Court.

Now it seems to be very clear that Owdas Koomar's payment to Ram Gobind, whether rightly or wrongly enforced or compelled by the Deputy Collector, went in discharge of Ruchen Roy's decree, which Owdas Koomar was bound to discharge. He paid the decretal money to Ruchen Roy's assignee, or to the person who pretended to be Ruchen Roy's assignee, instead of to Ruchen Roy himself. Putting the matter in the simplest light, and supposing the execution proceedings out of the way, we see that, in substance, Owdas Koomar only paid the debt which he was bound to pay, that is, if Ram Gobind really stood in the shoes of Ruchen Roy in regard to this debt, as he said he did. This being so, it seems to be very clear that Owdas Koomar, and consequently his representative, the present plaintiff, has no title to recover back this money, unless he can show that he has been in some way defrauded by the transaction. It might be open to him, on the actual state of things, to show that Ram Gobind was not in fact the assignee of Ruchen Roy; that Ruchen Roy's claim against him under this decree is not even yet satisfied; and that he is still liable to be

called upon to satisfy that claim. If he had in this suit laid any foundation of this kind he would have disclosed a good cause for recovering the money from Ram Gobind, which Ram Gobind had obtained under the decree. But it appears to us that he has no such cause of action merely because it has happened (if this be the case) that the proceedings in execution which the Deputy Collector set in force were *ultra vires*, or not done in full exercise of judicial discretion. Before Owdas Koomar could get his money back, he must show that it has not in fact gone to satisfy the decree by which he was bound and which it appeared to discharge, and that he has been defrauded of it.

We are told that there is an allegation in the plaint to the effect that Ram Gobind was not a *bonâ fide* assignee of Ruchen Roy. But, whatever this allegation may mean, it does not appear to have been supported by any evidence at the trial, nor do we learn that the plaintiff did anything towards showing that he was still liable to be called upon to pay this money over again, notwithstanding that he had already paid it to Ram Gobind, who professed to be Ruchen's assignee.

It has been pressed upon us that the *onus* of proving that he was the assignee of Ruchen Roy lay upon Ram Gobind in this suit, and that it was no part of the plaintiff's case to prove that he was not such assignee. But it seems to be pretty plain that inasmuch as the plaintiff cannot succeed in getting back the money which he has paid in satisfaction of the decree without showing that he has been defrauded or wrongfully damaged by the payment, it must necessarily be part of his case that Ram Gobind was not the assignee of Ruchen Roy, did not stand in his shoes, and that the receipt of the money by him did not shut the mouth of Ruchen Roy, but left him still free to put his decree of 1861 in execution.

On the whole of these facts, we think, independently of any question as to the motive under which the Deputy Collector acted in giving execution to Ram Gobind, the plaintiff's case must fail. Upon the facts of this case, he has not shown a good cause of action, and he has not proved any by his evidence. The decree of the Lower Appellate Court, therefore, must be reversed, and the plaintiff's suit dismissed with costs.

The 1st September 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

*Sale of a Decree—Auction-Purchaser—Assignee
—Lien.*

Case No. 149 of 1873.

*Special Appeal from a decision passed by
the Judge of Sarun, dated the 6th
September 1872, reversing a decision of
the Moonsiff of Chuprah, dated the 9th
December 1871.*

Nunhuk Sahoo (one of the Defendants)
Appellant,

versus

Juggessur Oopadhya (Plaintiff) *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

Mr. R. E. Twidale for Respondent.

Where the rights and interests of decree-holders in a decree are sold in execution, the party purchasing *bonâ fide* without any knowledge of a previous assignment of those rights and interests, is entitled to the proceeds of the purchased decree free from any trust or obligation in favor of the assignees.

Phear, J.—In December 1865, one Ali Mahomed borrowed Rs. 90 of certain ladies, whom it will be convenient to call the Mussamats, and, to secure its repayment, pledged certain property to them by a mortgage bond; and in the following year the Mussamats borrowed from the present plaintiffs the sum of Rs. 299, and as security for the repayment of this principal money and interest, they by a bond dated the 14th December 1866 pledged and hypothecated to the plaintiffs, among other things, this bond of Ali Mahomed's, with the condition imposed on themselves that, until repayment of the money, they would not sell, mortgage, or pledge the bond and other things to any one. But, apparently, plaintiffs did not obtain the mortgage deed itself from the ladies. In this situation of things, the Mussamats were left in a position to assert their mortgage rights against Ali Mahomed, and to recover the money due under the mortgage by bringing a suit upon it against him: but, as between them and the present plaintiffs, they were personally bound under their bond to give effect to the lien purported to be created thereby in favor of the present plaintiffs, and to afford them the benefit of whatever they might in this way realize

by way of discharging the debt due from them to the plaintiffs under that bond.

The Mussamats did in 1868 bring a suit against Ali Mahomed, and on the 31st December of that year they obtained a decree against him upon the mortgage bond, which directed, as we understand, the realization of it by sale of the mortgaged property.

It does not appear that the present plaintiffs were aware of that suit, or were personally in any way concerned with it. But, as between the Mussamats and Ali Mahomed, the decree in that suit clearly gave them the power to sell his property free of incumbrance other than any which might be prior to their bond of 1865 to a *bonâ fide* purchaser for value.

In August 1869, Nunhuk Sahoo, who is the defendant in this suit, and who had obtained so far back as 1866 a money decree against the Mussamats, caused the rights and interests of the Mussamats under the decree of 31st December 1868 to be seized and sold in execution of his own decree, and at the execution sale he bought this decree himself. He thus became entitled to the benefit of the decree of the 31st December 1868 as completely as if he himself had been the original judgment creditor, and more completely than the Mussamats were themselves entitled, provided he bought without notice of the assignment which they had made of their mortgage interest to the present plaintiffs; because while they under that assignment were personally bound, as has been already mentioned, to give the present plaintiffs the benefit of their rights and interests under the decree of 31st December 1868, he, if he purchased without any knowledge or notice of that assignment or of the obligation which the Mussamats incurred under it, would not have such an obligation resting upon him. After he bought this decree, he sought to get it executed; and the judgment debtor Ali Mahomed, rather than have his property sold under the decree, paid the money secured by the mortgage into Court. The present suit is brought by the present plaintiffs against Nunhuk Sahoo upon the ground that they are entitled to the mortgage money in preference to him. They endeavoured to make out their claim in this way: they sued the Mussamats upon the mortgage bond which they obtained from them in 1866, and obtained a decree upon it in September 1870; and in execution of that decree, they bought the right, title, and interest, whatever it then was, of the Mussamats under the mortgage made to them by Ali

Mahomed in 1865. In this way they say that they by this sale came into the position occupied by the Mussamats relative to Ali Mahomed's mortgage, such as that position was at the date of that mortgage, namely, 1865. In other words, they say that the effect of these transactions is to give them a lien upon the money which was realized under the decree of 31st December 1868, dating from the execution of the mortgage of 1865, and therefore of an origin prior to any claim which Nunhuk Sahoo can put forward under his purchase of 1869. But it seems very clear from the statement of facts which has before been made that, if Nunhuk Sahoo bought the decree of the 31st December 1868 *bonâ fide*, without any knowledge of the previous assignment effected by the Mussamats to the present plaintiffs of their interests under the mortgage of Ali Mahomed, he must be entitled to the proceeds of that decree free from any trust or obligation in favor of the plaintiffs. He may be likened to a purchaser who has bought from a trustee left with the title deeds in his hands, without having had any notice of the trust. It was therefore essentially necessary for the plaintiffs, in order to make a good cause of action against Nunhuk Sahoo, to show that at the time when he bought the rights and interests of the Mussamats, he knew that those ladies had those rights and interests simply as trustees for the plaintiffs. It does not appear that there is any attempt made in this case to make out that Nunhuk Sahoo had any notice of the plaintiffs' rights at all. He seems to have bought openly and publicly, and there is nothing to indicate that he was not a *bonâ fide* purchaser for value.

The principal question in this case seems to be essentially the question which of two innocent persons shall suffer; and the plaintiffs, who permitted the Mussamats to have the opportunity of obtaining a decree against Ali Mahomed in their own names, without doing anything to protect themselves, can hardly complain that they are the losers.

The plaintiffs' suit therefore fails, and ought to be dismissed. Consequently, the decision of the Lower Appellate Court must be reversed, and the plaintiffs' suit dismissed with costs.

It is hardly necessary to add that this decision in no way affects or interferes with the plaintiffs' remedy against the Mussamats. We merely say that they have failed to make out any right to follow the mortgaged property or its proceeds into the hands of a third person.

The 2nd September 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Purchase by Putneedar of Zemindaree Shares—
Liability for Rent—Set-off.*

Case No. 114 of 1873.

*Special Appeal from a decision passed by
the Judge of Beerbhoom, dated the 10th
September 1872, affirming a decision of
the Subordinate Judge of that district,
dated the 29th June 1872.*

Gooroo Dyal Chuckerbutty and another
(Defendants) *Appellants,*

versus

Keshub Bibee and others (Plaintiffs)
Respondents.

*Baboo Mohinee Mohun Roy for
Appellants.*

*Baboos Unnoda Pershad Banerjee, Nullit
Chunder Sein, and Chunder Madhub
Ghose for Respondents.*

The four defendants obtained jointly a putnee lease of Lot R, and subsequently purchased jointly 5 annas share in the zemindaree. Again defendants 1 and 2 separated from 3 and 4, each taking 8 annas of the putnee and 2½ annas of the zemindaree; and then defendants 3 and 4 sold their zemindaree right in 2 annas and 15 gundahs share to K, the plaintiff, retaining 5 gundahs share on their own account. Plaintiff sues to recover the rent of 2 annas and 15 gundahs from defendants 1 and 2, who deny plaintiff's claim, while they admit that they are liable for 8 annas rent of the putnee, treating themselves as their own zemindars for 2½ annas share in the zemindaree, and they allege payment of 5½ annas of the putnee rent to the 8 annas shareholder in the zemindaree, and a set-off against the other 2½ annas against their own claim as zemindars.

Held that as defendants 1 and 2 were strangers to the transfer of the rights of defendants 3 and 4 to the plaintiff, they have, as between themselves and the plaintiff, a right still to do what they did formerly, namely, set-off their putnee liability against their zemindaree right.

Markby, J.—In this case the position of the parties is somewhat complicated, but the question which we have to decide is a very simple one. The only claim in this suit is made against the defendants Nos. 1 and 2: the defendants 3 and 4 were joined in the suit, but no claim was made against them. It appears that the four defendants in the year 1245 obtained jointly a putnee lease of Lot Ruswa. Subsequently they purchased jointly five annas share in the zemindaree. Subsequently again the defendants 1 and 2 separated from the defendants 3 and 4, each

taking eight annas of the putnee and two and a-half annas of the zemindaree. After that separation the defendant No. 3, Bistoo Chunder, purchased the half-anna share of the zemindaree, and then the defendants Nos. 3 and 4 sold their zemindaree right in 2 annas and 15 gundahs share to Keshub Bibee, the plaintiff, retaining 5 gundahs share on their own account. This suit is brought by the plaintiff to recover the rent of 2 annas and 15 gundahs share for 1276, 1277, and 1278 from the defendants Nos. 1 and 2. Now the contention of the defendants Nos. 1 and 2 is that they cannot be compelled to pay any rent at all to this plaintiff. They admit that they are liable for eight annas rent of the putnee, treating themselves as their own zemindars for two and a-half annas share in the zemindaree. They say, and it is not denied, that they paid five and a-half annas of the putnee rent to the person who holds an eight-anna share in the zemindaree, and that they discharged their liability as to other two and a-half annas by setting it off against their own claim as zemindars for that portion of the putnee rent.

Now, the simple question which we have to determine is whether the defendants Nos. 1 and 2 are in a position so to act. It is not necessary for us to consider the question, which might be one of some difficulty, as to what exactly is the true effect of a person purchasing a share in a zemindaree in which he holds some interest as putneedar. When the defendants Nos. 1 and 2 separated themselves from the defendants Nos. 3 and 4, the mode in which they dealt with their interests was that each paid himself the share of the putnee rents to which he was entitled in respect of his zemindaree right. It is not denied that that was so in fact, and we think that it was as between the defendants a matter of right, and not of mere convenience, that this should be done. In the absence of any express arrangement forbidding them to do so, we think it ought to be presumed that this was the understanding between the parties; and it appears to us that nothing has occurred since the separation in any way to affect that position, so far as regards the defendants Nos. 1 and 2. The defendants Nos. 3 and 4 chose to sell their rights in the zemindaree to the plaintiff; but, as far as it appears in this case, the defendants Nos. 1 and 2 were wholly strangers to that transaction, and their rights cannot be in any way affected by it. They have, as between themselves and the plaintiff, a right still to do that

which they did formerly, namely, to set-off their putnee liability to the extent of two and half annas against their zemindaree right to the same extent. The position of the defendants Nos. 3 and 4 is wholly different; they are subject to any rights which might arise out of the transaction between them and the plaintiff. With that we have nothing whatever to do. All that we decide in this suit is that the defendants Nos. 1 and 2 have a right, as against the plaintiff, to pay themselves, as zemindars, the two and a-half annas as their share in the putnee rent.

Upon this ground, we think that the suit as against the defendants Nos. 1 and 2 is not well founded, and ought to be dismissed with costs. The judgments of both the Lower Courts must therefore be reversed, and the defendants Nos. 1 and 2 will be entitled to their costs from the plaintiff, including the costs of this appeal. We think that the plaintiff must pay the defendants Nos. 3 and 4 their costs of appearance in this Court.

The 2nd September 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Set-off—Cross-suit—Act VIII of 1859 ss. 195 & 121.

Case No. 1762 of 1872.

Special Appeal from a decision passed by the Officiating Deputy Commissioner of Cachar, dated the 13th July 1872, affirming a decision of the Moonsiff of that district, dated the 5th April 1872.

Radha Ram Deb (Plaintiff) *Appellant*,

versus

J. James, Executive Engineer, on behalf of Government (Defendant) *Respondent*.

Baboo Anund Chunder Ghosal for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Where a defendant claims a right of set-off arising out of one and the same transaction as that in which the suit originated, it is not equitable to drive him to a cross-suit; a decree under Act VIII of 1859 s. 195 and the latter portion of s. 121, being of the same effect and subject to the same rules as if it had been made in a separate suit.

Kemp, J.—We think this special appeal must be dismissed with costs. The only

point on which it was necessary to call upon the pleader for the respondent was with reference to the third ground of special appeal. We think, however, that, looking to the fact that the right of set-off claimed in this case arose out of one and the same transaction, it would not be equitable to drive the defendant to a cross-suit, and the decree of the Court in respect of the Rs. 122 awarded to the defendant under Section 195 and the latter portion of Section 121 is of the same effect and subject to the same rules as if this sum had been claimed in a separate suit by the defendant.

We dismiss the special appeal with costs.

The 3rd September 1873.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Mahomedan Law—Custody of Infants.

Case No. 197 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 21st March 1873.

Beedhun Bibee (Opposite Party) *Appellant,*

versus

Fuzuloolah and another (Petitioners)
Respondents.

Baboo Joy Gobind Shome for Appellant.

Baboo Grish Chunder Ghose for
Respondents.

Under the Mahomedan law the mother is of all persons best entitled to the custody of infant children up to the age of puberty; but her right is made void by marriage with a stranger.

Kemp, J.—THIS application was made under Act IX of 1861 by Fuzuloolah and Arzanoolah. In their application they stated that Lall Khan and Beedhun Bibee, the opposite party, had, under cover of an invitation to remain six days in the house of Beedhun Bibee, taken away a young girl about 10 years old on the 4th of Kartick 1279; that on their sending for the girl, Beedhun Bibee and Lall Khan refused to give her up, and they therefore presented a petition to the Court on the 12th of February 1873 to have the girl restored to their custody. The Judge appears to have examined one of the petitioners, as he was bound to do under Section 1 of the Act. The petitioner in his examination says that the girl is 9 or 10 years old,

and that they, i.e., Lall Khan and Beedhun Bibee, do not let her go because they intend to marry her. The Judge thereupon ordered the girl to be produced in Court, and in the presence of both parties the girl was examined, and she says that she wishes to stay with her mother. Pending the order of the Court the child was left with her mother, and on the 21st of March 1873 the Judge being of opinion that the petitioners were the proper persons to receive charge of the girl Sogheera, ordered that the child be made over to them, and the child was, in consequence of this order, made over to the custody of the petitioners in open Court.

In regular appeal, one of the grounds taken is that the learned Judge is wrong in taking up a new ground,—that of the appellant marrying a stranger,—which is not taken in the petition nor founded on the evidence adduced by the petitioners.

Then also there is a ground that the minor not being a mere infant and having expressed a desire to live with her mother, she should not have been made over to the respondents; and that the Judge's order is contrary both to the letter and spirit of the Mahomedan law.

It is somewhat remarkable in this case that there was considerable delay in applying to the Court under the provisions of the Act quoted above on the part of the respondents, as it appears that this girl was taken away from their custody on their own admission on the 19th of October 1872 on the pretext of a visit to her mother of six days, and no steps were taken by them until the 12th of February 1873.

However, be that as it may, on referring to the Mahomedan law on the question of the custody of young children, it is clear that the mother is of all persons best entitled to the custody of infant children; of course, there is some limit to that, and that limit is placed at the age of puberty. Then at page 432 of Baillie's Mahomedan Law, it is said that "the rights of all the women before mentioned are made void by marriage with strangers."

The whole case, therefore, depends upon whether the mother of this girl Sogheera has married a stranger or not. That point has not been decided in the case by the Judge, and we can find nothing in the petition, in the evidence, or in the Judge's judgment as to whether Lall Khan is really a stranger or not.

We keep the case on the file of this Court and direct the Judge to make an enquiry and submit his finding upon this point. The girl will remain in the custody she is now pending the further orders of this Court.

The 3rd September 1873.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

*Certificate of Administration—Act XXVII
of 1860.*

Case No. 121 of 1873.

*Miscellaneous Appeal from an order passed
by the Officiating Judge of Rungpore,
dated the 13th January 1873.*

Radhika Churn Sen, *Appellant,*

versus

Judoo Nath Gossamee and others,
Respondents.

*Baboos Nil Madhub Bose and Rajendro
Nath Bose for Appellant.*

*Baboos Hem Chunder Banerjee and Bacha-
ram Mookerjee for Respondents.*

It is not necessary, as a general rule, that a list of debts should be filed before a certificate can be granted under the provisions of Act XXVII of 1860.

Kemp, J.—THE appellant before us petitioned the Judge of Rungpore for a certificate under Act XXVII of 1860 to collect the debts due to the estate of Shokee Soonduree Dasse. The application was opposed by the respondents, who state that they are in possession under a hebanamah executed by Shokee Soonduree, and dated the 21st of Magh 1257. The petitioner admits in the petition of application that Shokee Soonduree Dasse died at Brindaban in 1277. The hebanamah under which the opposite party are in possession is dated the 21st Magh 1867, or 20 years before the death of Shokee Soonduree Dasse. The Judge has considered the evidence of the applicant's relationship to the deceased as not satisfactory. The old decision of 1797 does contain a description by Boydo Nath, the son of Gobind Pershad, to the effect that Jodoonath was the step-brother of Gobind Pershad, but this description does not agree with the statement of the applicant for a certificate.

It is said in the petition applying for a certificate that the lady has left debts due to her amounting to about 500 rupees, but it is not in any way shown what these debts consist of.

We think on the whole case and looking to the unsatisfactory evidence given by the

petitioner applying for a certificate, that the Judge was right in refusing to grant a certificate in this case.

The Judge has referred in his decision to a case decided by this Bench, to be found in volume XVIII, Weekly Reporter, page 330, as showing that it is necessary to file a list of the debts before any certificate can be granted under the provisions of Act XXVII of 1860. We do not find that this decision lays down a broad rule of that description. All that the Court held in that particular case was that neither party had filed a list of the debts of the deceased, and that from this circumstance the Court inferred that there were no debts to be collected. It appears in the present case that the opposite party are in possession, and this application appears to us to be an attempt to get possession by a side wind, and to collect the rents from the estate in the possession of the opposite party.

We dismiss the appeal with costs.

The 4th September 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Res Judicata—Cause of Action—Limitation.

Case No. 1361 of 1872.

*Special Appeal from a decision passed by
the Second Subordinate Judge of Bhagul-
pore, dated the 28th June 1872, affirming
a decision of the Moonsiff of Begoosaraï,
dated the 19th September 1871.*

Mohunt Nursingh Doss (Defendant),
Appellant,

versus

Moonshee Rumrooddeen and others
(Plaintiffs) *Respondents.*

*Mr. C. Gregory and Baboo Boodh Sen
Singh for Appellant.*

*Mr. R. T. Allan and Moonshee Mahomed
Yusoof for Respondents.*

A party obtaining a decree for possession and failing to execute it, is precluded from bringing a second suit against the defendant for possession of the same

property, unless upon a cause of action which has arisen since the decree was passed, and which is not itself barred by limitation.

Phear, J.—We think that the Subordinate Judge has not succeeded in obtaining a complete grasp of this case. The plaintiff sued to obtain possession of a certain property from the defendants. The ground of action was that he bought this property in the year 1857, and that the defendant has obtained possession of it and is wrongfully keeping him out of it. He is met by two defences, or, as they are commonly called, pleas in bar: first, that the suit is barred by limitation; and second, that you the plaintiff brought a suit to recover possession of this very same property against me and another person in 1862, and finally got a decree against us on the 9th February 1863; nothing new has happened since that date, and therefore for this reason (defendants say) this second suit is brought on the same cause of action as that first suit was, and is barred by reason of the subject being *res judicata*.

The Lower Appellate Court seems to be of opinion that the decree of February 1863 was in fact a decree in favor of the plaintiff, and against the defendant and others, for possession of this very same property, and on that account alone it says the present suit is not barred. But clearly, unless the present suit is founded upon a cause of action which has arisen since that decree was passed, if the want of possession on the side of the present plaintiff is nothing more than a continuation of his want of possession in February 1863, then the ground of this suit is nothing more nor less than that which was the ground of the suit of 1862. The matter in contest between the parties, namely, the wrongful holding of this property, is precisely the same matter as that which was adjudicated upon on the 9th February 1863 and for the same cause. It seems to be clearly *res judicata*. The plaintiff, having got a decree against the defendants in that suit, ought to have obtained satisfaction of the decree by ordinary process of execution. If the decree entitled him to obtain khas possession, he could have got by the aid of the Court actual possession of the land. If it only gave him a right to receive rents of the land, he could, on the foundation of that decree, compel payment of those rents to himself. He has not taken this course; but he brought a suit over again for the same cause of action against the same people, so far as the defendants are concerned, as those against whom he brought the suit of 1862. If he is allowed

to keep the decree which he obtained in the Court below, there is nothing whatever to show that it will be of more fruitful result to him than the decree of 1863. He may go on *ad infinitum* bringing suits of this kind—the truth is that the matter of this suit is *res adjudicata* by reason of the decree of the 9th February 1863. But if the Lower Appellate Court has made a mistake in thinking that the decree of February 1863 dealt with the same rights and same cause of action as are involved in the present suit, then that decree must for the moment be put on one side altogether; and it is incumbent upon the plaintiff in the present suit, independently of that decree, to show exactly when his present cause of action against the defendant arose, that is, when his enjoyment of the property last ceased, when he was deprived of it by the wrongful acts of the defendant of which he now complains, and when for that cause he first could have come into Court as he now does to vindicate his right against the defendant. The plaintiff has not attempted anything of this kind. It appears from the argument of the learned pleaders that there is very good reason why he should not have done so, namely, that he never has been in possession by actual enjoyment of this property ever since he bought it in 1857. It would thus be impossible for him to prove that a fresh cause of action had arisen between himself and the present defendant since the date of decree of the 9th February 1863. It may be, as the Lower Appellate Court remarks, that the right to the property in suit has been finally determined between the plaintiff and the defendant, but that right does not enable him to maintain a suit, if the cause of action itself accrued so far back as to bar the suit. And there is no force in the argument that, since the decree of February 1863, a new cause of action has arisen by reason of the disputed property having been partitioned off by a butwarrah and assigned to the defendant, because the property has been in no way changed, and has throughout remained in the possession of the defendant.

It therefore appears to us that the Lower Appellate Court was wrong in its decision, and it seems further to be useless to send back the case for re-trial upon the issue which was not directly considered by the Subordinate Judge, because there are no materials before the Court upon which the plaintiff could maintain the affirmative of this issue. We therefore reverse the decision of the Lower Appellate Court, and dismiss the plaintiff's suit with costs.

The 4th September 1873.

Present :

The Hon'ble F. B. Kemp,
Judge.

*Possessory Suit—Act XIV of 1859 s. 15—Onus
Probandi.*

Case No. 427 of 1873.

*Special Appeal from a decision passed by
the Officiating Deputy Commissioner of
Cachar, dated the 24th December 1872,
reversing a decision of the Assistant
Commissioner of that district, dated the
29th May 1872.*

Jokee Meah and others (Defendants)
Appellants,

versus

Joogul Kishore Surmah (Plaintiff)
Respondent.

*Baboo Huree Mohun Chuckerbutty for
Appellants.*

*Baboo Romesh Chunder Bose for
Respondent.*

In a suit brought on the footing of a bundobust (from Government) under which plaintiff and his brothers, it was alleged, had been in possession of land of which they were subsequently dispossessed by defendant, and which they failed to recover in an action under Act XIV of 1859 s. 15, defendant pleaded acquisition by purchase from the father of the plaintiff. The Lower Appellate Court decided in favor of plaintiff on the ground that it was for defendant to show that the land in dispute was within the conveyances filed by him:

Held that the decision was wrong in law, the onus being on plaintiff to prove his title.

Kemp, J.—THE defendant is the special appellant in this case. The plaintiff brought his suit on this footing, namely, that under a bundobust, I conclude from Government although that is not clearly stated, he and his brothers were in possession of the lands claimed, and that they were dispossessed of the same by the defendants; that the plaintiff subsequently brought a possessory action

under Section 15 Act XIV. of 1859, which was dismissed. The present suit, therefore, is brought as already stated on the basis of a bundobust.

The defendants state that they acquired the land by purchase; that the father of the plaintiff sold the lands in dispute to Fukeer Khan, and then that they were purchased back from him and sold to the defendants on the 3rd of Pous 1277.

The first Court, after ordering two Ameens to investigate on the spot, found that the boundaries were so confused that it was impossible to identify them satisfactorily on the spot, and therefore was obliged to rely upon the oral evidence, and found clearly that the defendants' case was supported by Fukeer Khan, the original vendee, as also by some of the witnesses for the plaintiff. The first Court, therefore, dismissed the plaintiff's case. On appeal, the Judge has reversed this decision mainly because in his opinion it was for the defendants to show that the land in dispute was indisputably within the conveyances filed by them, and because the defendants did not dispute the plaintiff's right to the land, if the kobalahs, as the Deputy Commissioner says, are "put out of the way." Now in my opinion the Deputy Commissioner's decision is wrong in law. The plaintiff, as already stated, does not base his suit upon any title vested in his father; and had he done so, I may here observe that the father being still alive, he is the party who ought to have brought the suit. The plaintiff brings the suit on the basis of a bundobust. He admits in his plaint that he has been defeated in the possessory action, and that the defendants are in possession. It was, therefore, for him to prove his title and not for the defendants to prove theirs; and further the defendants on this part of the case have shown on the evidence which has been read to me by the pleader for the special appellants that the plaintiff's father admits that he sold the lands in dispute to Jokee Meah and Fukeer Khan; that he bought back those lands from them and sold the same lands to the defendants.

On the whole case, I think it is clear that the plaintiff has not been able to prove his title, as he was bound to do, coming in as he does after the possessory action had been decided adversely to him. I concur in the judgment of the first Court, and I therefore reverse the decision of the Lower Appellate Court and dismiss the plaintiff's suit with costs in all the Courts.

The 4th September 1873.

Present :

The Hon'ble F. B. Kemp, *Judge.*

*Withdrawal of Suit—Act VIII of 1859 s. 97—
Declaratory Suit—Onus Probandi.*

Case No. 590 of 1873.

*Special Appeal from a decision passed by
the Judge of Chittagong, dated the 16th
December 1872, affirming a decision of
the Moonsiff of Seetakoond, dated the
3rd August 1872.*

Aboo Taleh (Defendant) *Appellant,*

versus

Abdool Nubee (Plaintiff) *Respondent.*

Baboo Aukhil Chunder Sen for Appellant.

No one for Respondent.

A plaintiff withdrawing his suit would be precluded from bringing a fresh suit on the same matter under Act VIII of 1859 s. 97 unless he could show that he had obtained the Court's permission to withdraw the former suit.

In a suit brought to have it declared that a document filed in a former suit by the defendant is spurious, the onus of proving such allegation is on the plaintiff.

Kemp, J.—THE defendant Aboo Taleh is the special appellant in this case. It appears from the plaint that the plaintiff brought a former suit against this defendant which he says he was permitted to withdraw with liberty to bring a fresh suit. The plaintiff has not been able to show, nor is there anything on the record to indicate that the plaintiff did obtain the Court's permission to withdraw the former suit, and without such permission he would be precluded from bringing a fresh suit on the same matter under Section 97 Act VIII of 1859. This suit also is clearly brought to have it declared that a document filed not for the first time in this suit, but in the former suit, by the defendant, special appellant, Aboo Taleh, is spurious. The onus, therefore, of proving such allegation was clearly on the plaintiff, and not on the defendant to prove the genuineness of the document as ruled by the Courts below. See decision in Volume XI, Weekly Reporter, page 980.

Now the Judge very properly remarks that the Moonsiff had gone astray in using evidence which had been taken in the former case. The onus being on the plaintiff and not on the defendants, and the evidence taken in the former case not being admissible, and

there being no evidence on the part of the plaintiff, on whom the onus is, to prove that this hebah set up by the defendant is a fabrication, and it being clear also that the plaintiff's former suit on the same subject-matter was not withdrawn with the permission of the Court, or at all events the plaintiff not having been able to show that it was so withdrawn, he was precluded from bringing this suit on the same subject-matter.

Holding, therefore, that the onus ought to have been placed on the plaintiff and not on the defendant, and with the onus on the plaintiff that he has wholly failed to prove that this document is, as alleged, a fabrication, and that the plaintiff was not entitled to bring the present suit on the same subject-matter as the former one, not having obtained the permission of the Court to do so, I reverse the decisions of both the Courts below and decree this appeal with costs.

The 5th September 1873.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Act XXIII of 1861 s. 11—Execution—Wassilat.

Case No. 206 of 1873.

*Miscellaneous Appeal from an order passed
by the Judge of Mymensingh, dated the
17th April 1873, reversing an order of
the Additional Subordinate Judge of
that district, dated the 30th November
1872.*

Bama Soonduree Dabee (Decree-holder)
Appellant,

versus

Tarinee Kant Lahoree (Judgment-debtor)
Respondent.

Baboo Nil Madhub Sen for Appellant.

Baboo Sreenath Dass for Respondent.

Where a decree-holder in execution takes possession of more land than is covered by the decree, and on an objection raised, and after inquiry made, the excess land is subsequently relinquished, the question of wassilat, being one which arises between the parties to the suit with reference to the execution of the decree, must, under Act XXIII of 1861 s. 11, be determined by the Court executing the decree, and not by a separate suit.

Kemp, J.—IN this case the special respondent Tarinee Kant Lahoree obtained a decree against the special appellant for certain lands, and in execution of that decree he appears to have taken possession of more lands than the decree covered. The special

appellant, Bama Soonduree, then petitioned the Court, and in the execution stage an enquiry was made, and it was found that Tarinee Kant Lahoree had taken possession of more lands than the decree authorized. After considerable litigation this land was given up to Bama Soonduree, the special appellant before us. Bama Soonduree deposited in Court the whole of the wassilat due to Tarinee Kant Lahoree and prayed that the wassilat which was due on account of the lands which Tarinee Kant Lahoree took possession of in excess of the decree, calculated on the basis of the enquiry of the Ameen deputed to settle the question of wassilat, might be paid to her out of that deposit.

The first Court was of opinion that, under Section 11 Act XXIII of 1861, Bama Soonduree was entitled to get the wassilat, and as the money was in deposit and as this appeared to be a case which came under the provisions of the Section quoted, directed that a certain sum, namely, Rs. 532-15-3 for wassilat and costs, out of the amount in deposit, be made over to Bama Soonduree, and that the residue be paid to Tarinee Kant Lahoree. On appeal, the Judge has reversed this order on the ground "that the meshe profits which under the provisions of Section 11 Act XXIII of 1861 are assessable by the Court executing the decree are only such as have been by the decree made payable in respect of the subject-matter of the suit between the date of the suit and the date of the execution of the decree;—any question of mesne profits not determined by the Court making the decree not being properly cognizable by the Court executing the decree." Now, in the first place, we may observe that, during the protracted litigation in respect of these excess lands when and after Bama Soonduree was successful in getting back the excess lands, she claimed wassilat for a considerable period, the special respondent before us never took the objection that the Court had no jurisdiction under Section 11 Act XXIII of 1861. His objection was that the claim for wassilat was barred under the statute of limitation. That objection was rejected, and the present one as to the jurisdiction has now been taken, evidently well knowing that if that objection can be maintained and Bama Soonduree is referred to a separate suit for wassilat, it would be of no good to her, inasmuch as her claim for wassilat is now barred.

Now in this case it seems to us that the

question which has arisen between the parties is a question which relates to the execution of the decree. Tarinee Kant Lahoree, in execution of the original decree, having taken possession of lands in excess of what he was entitled to take possession of under the decree, the question arose in execution of that decree on the objection of Bama Soonduree Dasse, and that question was decided in her favor, and we think that under the provisions of Section 11 the question of wassilat being a question which arises between the parties to the suit with reference to the execution of the decree, must be determined by the Court executing the decree, and not by a separate suit; and there is a case which has been referred to in Volume VII, Weekly Reporter, Civil Rulings, page 372, Radha Gobind Shah v. Brojendro Coomar Roy Chowdhury, which we think is in point.

We, therefore, reverse the decision of the Judge and restore that of the first Court in so far as it declares the right of Bama Soonduree to recover without a separate suit the amount of wassilat to which Bama Soonduree is entitled. The Judge will find whether Bama Soonduree is entitled to the sum claimed by her or not.

The 5th September 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

*Enhancement of Rent—Act VIII (B.C.) of 1869
s. 18—Pleadings—Onus Probandi.*

Cases Nos. 161 to 164 of 1873.

*Special Appeals from a decision passed by
the Judge of Shahabad, dated the 4th
September 1872, modifying a decision of
the Moonsiff of Arrah, dated the 22nd
June 1872.*

Doma Roy and others (Defendants)
Appellants,

versus

James Melon and others (Plaintiffs)
Respondents.

*Baboos Kalee Kishen Sen and Tarucknath
Paleet for Appellants.*

*Mr. C. Gregory and Moulvee Murhumus
Hossein for Respondents.*

In a suit to recover rent at an enhanced rate after notice upon grounds furnished by the first two clauses of s. 18 Act VIII (B.C.) of 1869, where defendant pleaded

that the land was mowrossee, held by him at a fixed rate of rent for generation after generation :

HELD that defendant's failure to prove this plea was no bar to his setting up that he had earned the right of occupancy in the land.

HELD that plaintiff could not succeed without proving the substance of each part of cl. 1, and that it was not enough to show that the rate paid by defendant was below the prevailing rate for adjacent land of a similar description and with similar advantages; but it must also be shown that the prevailing rate was paid by ryots of the same class as defendant.

Phoar, J.—THE judgments in both the Lower Courts are long and very full, and it certainly cannot be made matter of complaint that the case has not been investigated with considerable assiduity; but nevertheless it has not in the result been left entirely free from doubt and difficulty.

The plaintiff sued to recover rent at an enhanced rate, after notice, from the defendant upon the grounds which are furnished by the first two Clauses of Section 18 Act VIII (B.C.) of 1869.

The defendant pleaded, *first*, that the land held in cultivation by him is mowrossee,—land held by him for generation after generation at a rate of rent which has not been varied; and *secondly*, that no tenant of his class, and occupying the same quality of land as he did, paid any higher rate than he did.

The Lower Appellate Court, after a careful discussion of the evidence bearing upon the point, has arrived at the conclusion that the allegation made by the defendant to the effect that he had held this land at a fixed rent for generation after generation is not made out; and having failed in this, according to the opinion of the Lower Appellate Court, the defendant was barred from alleging that he had a right of occupying under the statute by reason of having held the land for a period of 12 years or more. And on this ground the Lower Appellate Court, being of opinion that the rates of rent reported by the Ameen as the rates of rent prevailing in the neighbourhood, held that the plaintiff had made out his case.

But it appears to us that the defendant was not barred from setting up that he had earned the right of occupancy in this land merely by reason of his having failed to prove that he had held it at a fixed rate from generation to generation. The lesser allegation seems to be involved in the greater; and it might be that, although the defendant failed to satisfy the Court that he and his predecessors had always paid rent for this land at the same unvarying rate, yet that he could bring very convincing proof that they had been holding the land from generation to

generation, or at any rate for a period exceeding 12 years. And if this were so, and if this were made out, then he would be entitled to the benefit of the fact that he had a right of occupancy whatever might be the extent of such benefit. It possibly was an ingredient amongst others going to make up the character which the defendant bore, and so might help to distinguish the class of ryot to which he belonged from the other classes of ryots in the village.

Moreover, irrespective of this point, the plaintiff could not succeed in this suit without proving the substance of each part of Clause 1; namely, that the rate of rent paid by the defendant was below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. The Lower Court has arrived at the conclusion that the rate of rent paid by the defendant is below the prevailing rate paid for land of similar description and with similar advantages in the places adjacent, but it has abstained from enquiring whether this prevailing rate is paid by the same class of ryots as that to which the defendant belongs. The Lower Appellate Court appears to have advisedly abstained from entering into this enquiry. It seems very clear that, although the defendant failed in making out the first part of his defence, he was quite entitled to insist that the plaintiff should prove that the prevailing rate on which he relied was a rate paid by ryots of the same class as that to which he, the defendant, belonged: in other words, the plaintiff was bound amongst other things to satisfy the Court that the ryots who paid the prevailing rates which were proved were of the same class of ryot as the defendant. The burden would lie upon the plaintiff of first showing what class the defendant belonged to, and then of showing that the ryots who paid these prevailing rates were also ryots of the same class. It might, as has already been remarked, be a fact relevant to this issue that the defendant was a ryot with a right of occupancy: it might be again a fact still more relevant that he was a ryot who with his ancestors had occupied this land for generation after generation, for a great number of years, because it is quite conceivable that a hereditary ryot of that kind, although he had not obtained a right to hold at a fixed rent, might be reckoned in the village as belonging to an entirely different class from the other class who paid the higher rate. While we make these remarks, we

- desire also to say that we see no reason for laying down as a rule that a ryot having a right of occupancy, merely for that reason, is in a different class from ryots who have not succeeded in obtaining a right of occupancy. If that were so, then the effect of Section 6 would be to give, after the expiration of 12 years' occupation, not merely a right of occupancy, but a right to hold at a more favorable rate of rent than before.

We think the case must be remanded for the purpose of trying whether or not the defendant is of the same class of ryot as those who have been proved by the evidence in the case to pay the prevailing rate of rent, which rate of rent has been assessed as the rate of rent proper to be paid in this suit by the defendant.

Costs will abide the event.

It is admitted by the pleaders of the respective parties that the like order will be made in all the four cases.

The 5th September 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Attachment—Presumption.

Case No. 170 of 1873.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 9th August 1872, affirming a decision of the Subordinate Judge of that district, dated the 15th May 1872.

Mussamut Goonjessur Koonwar (Plaintiff)
Appellant,

versus

Luchmee Narain Singh and others
(Defendants) *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Kalee Kishen Sen for Respondents.

Where an attachment more than nine years old, made in execution of a decree more than twelve years old, was

pleaded as an injunction operative under the Civil Procedure Code, s. 240, the Court, **HOLD** themselves bound to assume, in the absence of other information, that the attachment had been removed and the execution proceedings had all come to an end.

Phear, J.—The plaintiff is clearly entitled to a decree unless the conveyance which she obtained from her father-in-law on the 28th August 1867, was prohibited by a Civil Court injunction operative at the time, under Section, 240 of the Civil Procedure Code. It is said that an attachment, put upon the property on the 15th June 1858 by the first defendant as judgment-creditor in execution of the decree which he had obtained against the father-in-law, was such an operative prohibition in August 1867. There is evidence on the record of this attachment, and there is evidence of the decree in execution of which it was made having been passed on the 30th June 1855, and no other facts connected with the execution of this decree seem to have been put in evidence before the Lower Courts. As, then, the record stands in August 1867, there was only this attachment of June 1858 made in execution of the decree of the 30th June 1855; that is, an attachment more than 9 years old made in the execution proceedings of a decree more than 12 years old. In the absence of any other information upon the matter, and in the spirit dictated by the decision of the Privy Council, which is to be found in XX Weekly Reporter, page 135, we are bound to assume that the attachment had been removed and the execution proceedings had all come to an end before August 1867. If this were not so, it was the fault of the defendant, judgment-creditor, that he did not prove better matter of defence than he has proved.

We are told, but of this fact we have no proof, that the judgment-creditor did apply for attachment and execution in August 1867. If this were so, it would afford almost convincing proof that the former attachment and the proceedings in execution had in fact previously come to an end; and whether they had done so or not by reason of abandonment or satisfaction of decree, it would seem in the absence of all information bearing upon the point that the decree itself must have been barred.

We reverse the decision of the Lower Appellate Court and remand the case for re-trial upon the first and second issues raised in the Court of first instance.

Costs will abide the event.

The 5th September 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Privy Council Decrees—Execution.

Case No. 105 of 1873.

*Miscellaneous Appeal from an order passed
by the Subordinate Judge of Sarun,
dated the 27th February 1873.*

Gooroo Surun Dass and others (Decree-
holders) *Appellants,*

versus

Hunooman Pershad Sahoo and others
(Judgment-debtors) *Respondents.*

*Mr. R. T. Allan and Baboos Sreenath
Dass and Kalee Kishen Sen for Appel-
lants.*

No one for Respondents.

When a decision of the Privy Council is sent down to the Court of first instance by the High Court and becomes the final decree in the case, the Court of first instance is bound to execute it in the same way precisely as if it was an express decree of the High Court.

Phear, J.—It is quite clear that so far as regards the effect of the decree upon the two judgment-debtors who have been duly summoned in this case, the Subordinate Judge has fallen into error. As the other judgment-debtor is not before us, we cannot pass any decision which shall affect him.

When the decision of the Privy Council was sent down to the Court of first instance by this Court, the effect of this proceeding was that this decision became the final decree in the case, which the Court was bound to execute in the same way precisely as if it was an express decree of this Court, *i.e.*, to take all such measures as would be necessary to effect execution of it as if it had been in terms a decree of this Court. We, therefore, reverse the order of refusal of the Subordinate Judge so far as regards the two judgment-debtors who have been summoned, and send back the case in order that the execution proceedings may go on.

We allow one gold mohur for costs.

The 5th September 1873.

Present :

The Hon'ble Dwarkanath Mitter, *Judge.*

*Sale of Tenure—Change of Rent—Act VIII
(B.C.) of 1869 s. 4.*

Case No. 1040 of 1873.

*Special Appeal from a decision passed by
the Judge of Jessore, dated the 17th
February 1873, affirming a decision of
the Moonsiff of Magoorah, dated the 27th
March 1872.*

Soodha Mookhee Dassee (Plaintiff)
Appellant,

versus

Ram Guttee Kurmoker (Defendant)
Respondent.

Baboo Bipro Dass Mookerjee for Appellant.

Baboo Ram Churn Mitter for Respondent.

The sale of a portion of a tenure involving a distribution of the rent over two parts does not amount to a change of rent within the meaning of Act VIII (B.C.) of 1869 s. 4.

Mitter, J. — I AM of opinion that this special appeal ought to be dismissed. The admission relied upon by the special appellant does not show that there was a change in the rent payable by the defendant. All that the defendant said in the 4th para. of his written statement was that a portion of his tenure having been sold to some other person, the rent was proportionately distributed over the two parts of the tenure. This in my opinion does not amount to a change of rent within the meaning of Section 4 Act VIII (B.C.) of 1869. The defendant has proved that he is entitled to the benefit of the presumption referred to in that Section, and it was for the plaintiff to rebut that presumption by showing either that the rent had been changed, or that it was fixed at some period subsequent to the date of the permanent settlement.

The appeal is dismissed with costs.

The 5th September 1873.

Present :

The Hon'ble Dwarkanath Mitter, *Judge.*

Arbitration Award—Act VIII of 1859 s. 327.

Case No. 1271 of 1873

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 31st March 1873, affirming a decision of the Sudder Moonsiff of that district, dated the 31st July 1872.

Nursing Gariwan (Defendant) *Appellant,*

versus

Puttoo Ostagur (Plaintiff) *Respondent.*

Baboo Kumla Kant Sen for Appellant.

Moonshee Serajul Islam for Respondent.

An award of arbitrators is not a nullity because it has not been filed in Court under the provisions of Act VIII of 1859 s. 327.

Mitter, J.—I AM of opinion that the decisions of both the Lower Courts are erroneous in law, and ought therefore to be reversed. Those Courts were wrong in holding that the award of the arbitrators relied upon by the defendant was a nullity because it had not been filed in Court under the provisions of Section 327 of the Code of Civil Procedure; and in support of my view, I have simply to refer to a decision of this Court in VII Weekly Reporter, page 269, and also to a decision of the Madras High Court reported at page 119, Volume IV Madras High Court Reports. The plaintiff wanted to get rid of the arbitration award upon the ground that the arbitrators did not sit together to decide the case which was referred to them for arbitration, but caused the decision to be written by some other person, and afterwards signed it at different places. No evidence, however, has been given by the plaintiffs to prove this allegation. On the contrary, it is clearly proved by the evidence of the arbitrators and some other witnesses that there was no impropriety or misconduct on the part of the arbitrators,—that they all went to the spot and settled the dispute according to the deeds of reference. It has been said that one of the arbitrators stated in his deposition that the award was contrary to the deeds of reference; but this appears to be clearly a mistake, for that very arbitrator says in the most distinct terms, that he and his co-arbitrators had gone to the spot and settled the dispute then and

there according to the kobalas of the respective parties. The word “न” appears to have been evidently left out in recording the deposition of this witness. Holding, therefore, that the award of the arbitrators is binding between the parties, I reverse the decisions of both the Lower Courts and dismiss the plaintiff's suit with all costs.

The 5th September 1873.

Present :

The Hon'ble Dwarkanath Mitter, *Judge.*

Proceedings under Act IV of 1840—Evidence.

Case No. 1103 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Cuttack, dated the 15th February 1873, modifying a decision of the Officiating Moonsiff of Pooree, dated the 22nd August 1872.

Mohunt Radha Churn Dass Gossamee
(Plaintiff) *Appellant,*

versus

Akran Khootea (one of the Defendants)
Respondent.

Baboos Obhoy Churn Bose and Juggut Churn Banerjee for Appellant.

Baboo Mohendro Lall Mitter for Respondent.

Proceedings under Act IV of 1840, to which both litigants have been parties, may be treated as evidence between them on the question of possession.

Mitter, J.—I SEE no reason for interfering in the case. The Judge of the Lower Appellate Court has found as a fact that the plaintiff has failed to prove his possession within 12 years prior to the institution of this suit. It is said that the Judge has not taken into consideration the measurement papers and other evidence produced by the plaintiff, but there is no ground for holding that this contention is correct. It has been further urged that the Judge was wrong in law in treating the proceedings under Act IV of 1840 as evidence in favor of the defendants. No authority has been cited in support of this contention, and I see no reason why those proceedings to which both the litigants were parties should not be treated as evidence on the question of possession. The appeal is dismissed with costs.

The 8th September 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, Dwarkanath Mitter, and C. Pontifex, *Judges*.

Small Cause Courts—Special Appeal.

Case No. 131 of 1873.

Miscellaneous Special Appeal from an order passed by the Assistant Commissioner of Manbhoom, dated the 5th February 1873, affirming an order of the Extra Assistant Commissioner of Rughoonathpore, dated the 1st October 1872.

Gora Chund Missre (Decree-holder)
Appellant,

versus

Rajah Boykunto Narain Singh (Judgment-debtor) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Bhowanee Churn Dutt
for Respondent.

A special appeal does not lie from the decision of the Lower Court on a regular appeal in a suit of the nature cognizable by Courts of Small Causes.

This case was referred to the Full Bench by Couch, C.J., and Glover, J., on the 24th July 1873, with the following remarks :—

Couch, C.J.—THE proceedings in which this special appeal is preferred were in execution of a decree made on the 25th of May 1848 for Rs. 240, being the amount claimed. The suit was one of the nature cognizable in Courts of Small Causes under Act XLII of 1860. It has been objected that a special appeal does not lie from the decision of the Lower Court on the regular appeal, and a decision in VIII Weekly Reporter, 107, has been cited in support of the objection. As our opinion differs from that decision, we refer this appeal for the final decision of a Full Bench.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—We are all of opinion that an appeal does not lie in this case.

The appeal will therefore be dismissed with costs.

The 8th September 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Title—Possession—Onus Probandi.

Case No. 1143 of 1873.

Special Appeal from a decision passed by the 1st Subordinate Judge of Hooghly, dated the 21st March 1873, reversing a decision of the Moonsiff of Seirampore, dated the 26th June 1872.

Raj Kishen Mookerjee (Defendant)
Appellant,

versus

Pearee Mohun Mookerjee and others
(Plaintiffs) *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Issur Chunder Chuckerbutty for
Respondents.

In a suit which was really one to recover the possession to which plaintiff was entitled, the plaint alleged that plaintiff had been in khas possession and had been dispossessed by defendant. The plaintiff having proved a *prima facie* title, and defendant failing to prove any title to possession, the first Court decreed the suit. The Lower Appellate Court reversed the decree on the ground that plaintiff had not proved the allegation of khas possession or that of dispossession:

Held that the Lower Appellate Court took too narrow a view of the plaintiff's case and decided the suit upon a wrong issue; for plaintiff's title having been admitted, he ought not to have been required to prove khas possession in order to recover the land from one who had no title to it.

Couch, C.J.—THE suit was substantially to recover possession of land which the plaintiff stated was in the defendants' possession, and which the plaintiff was entitled to have possession of.

The plaint (as it is not infrequent in these cases) says that the plaintiff was in khas possession and the defendants dispossessed him, but the suit was really to recover the possession which the plaintiff was entitled to. It is stated in the judgment of the Moonsiff, and has not been questioned either in the Appellate Court or in this Court, that the plaintiff purchased the land in dispute under a kobalah dated the 2nd of Chyet 1277, and it was admitted by both parties that the persons from whom he purchased were proprietors of it. This is what the Moonsiff says. That would give the plaintiff a *prima facie* title to the possession of the land, and it would be for the

defendants to show that by some title which they had they ought to be continued in the possession, and that the plaintiff could not deprive them of it.

The Moonsiff framed an issue, "whether the plaintiff's vendor was in khas possession of the property set forth in the plaint, and whether the plaintiff, since his alleged purchase, held khas possession of the property under claim and has been forcibly dispossessed therefrom by the defendants; or whether, as alleged by the defendants, the said property was held by the tenant Gunesh Ghose under a dur-mokururee mowrosee title and was purchased from him by the deceased Hur Mohun Mookerjee, who, as alleged by the defendants, held possession of it by leasing the same to Dhurmo Dass Sholmal."

The first part of this issue was, considering the nature of the plaintiff's claim, too narrow. It attributed more importance to the allegation of khas possession and forcible dispossession than ought to have been attributed to it, and it put upon the plaintiff the necessity of giving proof which, seeing what was admitted, he ought not to have been required to give. His title to the land was admitted, and it was not therefore necessary that he should give this evidence in order to enable him to recover it from a person who had no title to the possession, as it was stated the defendants had not. The latter part of the issue raising the question whether the defendants had the title to keep the possession was right.

It was not of much consequence in the first Court that the issue was framed in this way, because it came to a conclusion in favor of the plaintiff and gave him a decree, but when the case came by appeal before the Subordinate Judge, he tried it upon this issue strictly. Although it was clear that the plaintiff was entitled to the land and therefore to possession, unless the defendants could show a title to the possession, he dismissed the plaintiff's suit because he had not proved the allegation of khas possession and also the allegation of dispossession. In that he was wrong. He took much too narrow a view of the plaintiff's case and has decided the suit upon a wrong issue.

The decision in the XII Weekly Reporter, page 365, is an authority against what he has done, and so also is the recent decision of this Bench in special appeal 389 of 1872,*

and also to some extent the decision in special appeal 697 of 1872.*

The case in the VIII Weekly Reporter, page 384, which has been quoted for the respondent, is distinguishable from the present. There, as we understand the case, the learned Judges decided that it being shown that the occupation of the defendant was by the permission of the plaintiff, and that the plaintiff had treated the defendant as a tenant, the plaintiff could not recover possession from the defendant without having in the first instance determined the tenancy which was of a permissive character. But here there is no permission by the plaintiff to the defendants to keep the land, or treatment of the defendants by the plaintiff as tenant shown. On the contrary, it would appear that the defendants had from the first been asserting a title adverse to the plaintiff and claiming to keep possession of the land under some alleged title which they had derived from the former occupier of it; but which they failed to prove.

The case has been wrongly tried by the Subordinate Judge, and decided against the plaintiff upon an issue upon which it ought not to have been decided against him. It must be remanded for re-trial. The costs will follow the result.

The 8th September 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

*Procedure—Act VIII of 1859 ss. 204 & 210—
Judgment-debtor's Property—Pursuit by Judgment-creditor.*

Case No. 142 of 1873.

*Miscellaneous Appeal from an order passed
by the Subordinate Judge of Bhaugul-
pore, dated the 17th February 1873.*

Shah Ameen Ahmed, *Appellant,*

versus

Syud Velaet Ali Khan (Decree-holder)
Respondent.

Mr. C. Gregory for Appellant.

Mr. R. E. Twidale and *Moonshee Mahomed Yusoof* for Respondent.

An application under s. 210, Civil Procedure Code, cannot be allowed to succeed upon the ground which

* *Ante*, page 374.

* 19 W. R., 188.

would support an application under s. 204, and an application under the s. 204 must be disposed of on a state of facts which would give the Judge power to issue the order under s. 204.

Where a judgment-creditor delays long after the death of the judgment-debtor in following such debtor's property into the hands of his heir, it is incumbent on him to explain the reason of the delay.

Phear, J.—THIS is a regular appeal against an order made by the Subordinate Judge in certain execution proceedings. But, in consequence of the course which things have been allowed to take in the Court below, we have really no materials whatever before us which would enable us to determine the matter in contest between the parties, and therefore we have no other alternative than to reverse the order of the Subordinate Judge and to send back the case to him for a proper trial.

So far as we can learn the state of the facts, it is this:—The present appellant, against whom the order in execution has been made, was not a party to the suit, or affected by the decree which is sought now to be executed. He was first brought into the execution proceedings by an application which the judgment-creditor made on the 20th September 1872. In that application, as it has been read to us, the judgment-creditor sought to make the present appellant liable in execution of a decree against one Mussamut Wuzeroonnissa by reason of his being heir to Wuzeroonnissa and in possession of assets originally belonging to her and descended to him by inheritance as her heir. On that application being made by the judgment-creditor, the Subordinate Judge ought to have called upon the other side, the present appellant, to answer it, and to have fixed a day giving opportunity to both sides if they wished it to adduce evidence upon the matters of fact which were involved in the application. But it appears that the Subordinate Judge did not take this course. He issued an order of attachment against the present appellant's property on the 7th November 1872, without giving him any previous notice whatever. And the present appellant first came into Court on the 8th January 1873, with a petition in which he protested against his property being sold in execution of the decree.

At that time no hearing of the matters alleged in the judgment-creditor's petition of the 20th September 1872 had been had, and no order had been made by which the present appellant was put upon the record or

in any way made liable to the decree originally passed against Wuzeroonnissa. The Subordinate Judge issued a notice of this petition to the judgment-creditor, and upon receiving the answer of the judgment-creditor he made the order which is now complained of.

If we are right in supposing that the application of September 1872 was an application to make the present appellant liable under Section 210 of the Civil Procedure Code, then it would seem that there are no materials at all before the Court upon which the question as to the right of the judgment-creditor to make the present appellant so liable could be determined, unless the petition of the present appellant filed in January 1873 be such material. And upon that petition it is clear enough, if his statements are to be taken, that he is neither heir of Wuzeroonnissa nor in possession of any of her property. But we are told, on the other side, that if the judgment-creditor had the opportunity of putting forward his case, it would appear that the statements in the petition of the present appellant are not correct. Whether this is so or not, we are perfectly unable to say: we have absolutely no evidence either in support of those statements or on the other side in refutation of those statements. In truth it is quite apparent that the question which was raised between the parties by reason of the application which the judgment-creditor made on the 20th September 1872 has never been at all tried in the Court below. And thus it has happened that we are without the means of trying this regular appeal.

We may be wrong in supposing that the application of September 1872 was an application under Section 210 of the Civil Procedure Code, because it seems in answer to the petition which the present appellant presented in January 1873, the judgment-creditor said that he was seeking to make the present appellant liable, not as heir of Wuzeroonnissa, but as a person who had become liable as a surety for the payment of the decree.

However this may be, the application is single in its nature and must be disposed of upon its merits.

If it is an application under Section 210; then the Judge must satisfy himself that the facts are such as would justify him in making

the order against the present appellant, which Section 210 gives him jurisdiction to make. He cannot allow the application, if it be an application falling within Section 210, to succeed upon the ground which would support an application under Section 204. If, on the other hand, it is an application to make the present appellant liable because he falls within the provisions of Section 204, it must be disposed of upon a state of facts which would give the Judge power to issue the order under Section 204.

Also, we may add, whatever may be the real character of the application, if it fails on its merits, the applicant, judgment-creditor, would not be barred in making the application in the alternative form.

We will also add that it ought to be a matter of consideration with the Judge, when he is called upon to deal with the application under Section 210, whether the applicant, under all the circumstances of the case, had made his application with due diligence and without unnecessary delay, because, while the law allows a judgment-creditor to pursue the property of his deceased debtor into the hands of an heir or a person who has taken it as a volunteer, it is still incumbent upon him to do so without unnecessary delay. He cannot be allowed after any lapse of time whatever to make a claim against the assets in the hands of a person who had succeeded to them honestly and held them without notice of his claim. The period which has elapsed since the death of Wuzeroonnissa is already somewhat about 8 or 10 years, and it will be incumbent upon the judgment-creditor to show why it is that he has delayed so long before he has followed her property into the hands of her heir. The decree itself is upwards of 20 years old. It seems altogether unexplained why it was not even satisfied during the lifetime of Wuzeroonnissa herself.

We reverse the order of the Subordinate Judge and remand the case to him for a full and proper enquiry on the footing of the judgment-creditor's petition of the 20th September 1872.

Costs of this appeal will abide the event; plender's fees being assessed at two gold mohurs.

The 8th September 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Procedure—Act VIII of 1859 s. 256.

In the matter of

Brojo Mohun Thakoor, *Petitioner,*

versus

Shah Ameenooddeen and another, *Opposite Party.*

Mr. R. E. Twidale for Petitioner.

Mr. C. Gregory and *Moulvee Murhumut Hossein* for Opposite Party.

The issue which arises when a petition is preferred under Act VIII of 1859 s. 256 is a judicial proceeding and ought to be carried out with regularity, the Court fixing a day for the hearing of the matter of the petition and giving reasonable notice to all parties, i.e., such as would afford to each party fair and reasonable opportunity of bringing the necessary evidence on or before that day.

Phear, J.—It is unfortunate that this matter has come before us for decision upon very scanty materials. The judgment-debtors and judgment-creditor who have been called upon to show cause against the rule have failed to put in any affidavit, or to bring under our notice anything that we could consider as an answer to the facts which have been made out by the affidavit of the petitioner. It appears from that affidavit that the petitioner purchased the property which is the subject of the Subordinate Judge's order at an execution sale, which was held on the 17th February 1873. On the 3rd March 1873, that is, within the period of 30 days after the sale, the judgment-debtors put in one or more petitions, depositing at the same time the sum of Rs. 4,914; and by these petitions they complained that the execution sale had been irregularly held (specifying, as we understood, certain particulars of irregularity) and that the consequence of this was that their property had been sold at an under-value and accordingly to their prejudice and loss. On the 13th April, the judgment-debtors further filed certain Collectorate proceedings. And on the 22nd May 1873 the Subordinate Judge, without having previously fixed a day for the hearing of this matter, suddenly called upon the plenders of both parties, as they are termed; and after hearing so much as they

had to say at the time, before him, made the order setting aside the sale of the 17th February 1873 which is now complained of.

We gather these facts from the affidavit of the present petitioner, and in the absence of anything to the contrary we must take them to be the substantial facts of this case: and upon these facts it is very plain that the Subordinate Judge in making the order of the 22nd May 1873 did not act in a proper and judicial manner. The question which he had to determine was of very serious moment both to the one side and to the other. If the present petitioner had made an advantageous purchase at a good and effective sale held in execution of a decree, he was entitled to retain the benefit of that advantage; if, on the other hand, the sale proceedings were irregular and not according to law, and the judgment-debtors had been prejudiced in the way in which they have said that they were prejudiced, then it is only right and just that the sale should be set aside and the matter put in *statu quo* as it very well can be by the return of the purchase money with interest to the purchaser. But a question of so serious a character as this is ought to be tried in such a way as will give all parties an opportunity of putting the facts of their respective cases fairly before the Judge, and of properly discussing them. The issue which arises in a proceeding of this kind, that is to say, when a petition is preferred under Section 256 of the Civil Procedure Code, is a judicial proceeding and ought to be carried out with regularity. Upon the petition being filed in March 1873 the Subordinate Judge ought to have fixed a day for the hearing of the matter of the petition and given reasonable notice thereof to all parties, *i.e.*; such notice as would afford to each party fair and reasonable opportunity of bringing the necessary evidence before the Court on or before that day. This it appears to us has not been done, and therefore we are of opinion that the order made on the 22nd May 1873 was arrived at without due judicial enquiry and consideration.

We desire to express no opinion whatever as to the merits of that order; we confine ourselves to saying that it appears to us that the investigation such as it was, which the Subordinate Judge made, was not a fair and judicial trial of the question at issue between the parties, and therefore not sufficient to serve as a proper foundation for the making of that order. Accordingly, we direct that the order be set aside. The Subordinate Judge will carry out the proceedings upon

the footing of the petition of March in a regular manner, giving all the parties reasonable and proper notice of the day upon which the investigation and enquiry will be held.

The rule will, therefore, be made absolute, and we think that the costs of the rule ought to abide the result of the investigation.

The 10th September 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Appeals—Default—Re-hearing—Act VIII of 1859 ss. 346 & 347.

Case No. 1248 of 1873.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 20th March 1873, affirming a decision of the Moonsiff of Magoorah, dated the 10th July 1871.

Mohesh Chunder Bose and others (Plaintiffs)
Appellants,

versus

Thakoor Dass Gossamee and others (Defendants) *Respondents.*

Baboo Grija Sunkur Mojomdar for
Appellants.

Baboo Bama Churn Banerjee for
Respondents.

Where a Judge, on the non-appearance of the appellant in person or by pleader, instead of observing the direction of the law, Act VIII of 1859 s. 346, goes into the merits of the case and gives a judgment against the appellant, the appeal must be considered as dismissed for default of the appellant in appearing; and an application for re-admission and re-hearing cannot be treated as one for review, but must be entertained under s. 347.

Couch, C.J.—THE first Court having dismissed the plaintiff's suit, as not being proved, he appealed to the District Court; but when the case was called on in that Court, he did not appear either personally or by any vakeel. It is said, and is not disputed, that the plaintiff had retained three vakeels, and the reason why not one of them appeared is said to be that all three were engaged in other Courts.

The Judge, instead of dismissing the appeal for the non-appearance of the appellant in person or by pleader, appears to have thought that it was his duty to see what were the merits of the case; and accordingly he gave a judgment, in which, after saying that the onus was upon the plaintiff and that he only produced certain witnesses, he said he considered that the evidence was not sufficient to establish the plaintiff's title and oust an old occupant. He was wrong in taking that course. He ought to have observed the direction of the law and acted under Section 346 of the Code of Civil Procedure.

This Court has held, in the case in XV. Weekly Reporter, page 193, that where a Judge does as this Judge did, the appeal must be considered as having been dismissed for default of the appellant in appearing. Perhaps it ought to have occurred to the Judge that it was not a satisfactory way of considering or of deciding upon the merits of the case when he did not hear what the appellant had to say in support of his case.

Then the appellant made an application in the same Court, but to another Judge, Mr. Pepper having apparently quitted the office. The Additional Judge who heard that application said that the appeal was not dismissed for default, but was tried upon its merits, and consequently he refused to interfere except upon a review, and would not entertain the application as made under Section 347. There he was in error according to the decision we have referred to, for although the Judges speak of an application for a review, what, considering their decision, they must have meant was an application for a re-admission of the case and a re-hearing, not for a review.

The position of things is that in consequence of the erroneous proceeding of the Judge on the first occasion in going into the merits in the absence of the appellant, and of the Additional Judge upon the application to him considering that it was a decision on the merits and that he could not interfere under Section 347, the plaintiff has a decree against him dismissing his suit. That ought not to be allowed to stand. We think we need not now determine whether the Court would have considered, if the application had been taken under Section 343, that there was a sufficient reason or not for the appellant not appearing. There has been an erroneous procedure of these Courts which vitiates the decision that is appealed from, and we think the decrees must be set aside and the case remanded for re-hearing.

The 11th September 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Reviews—Jurisdiction—Act VIII (B.C.) of
1865 s. 16—Resident Cultivators.*

Case No. 104 of 1873.

*Special Appeal from a decision passed by the
Judge of West Burdwan, dated the 28th
September 1872, reversing a decision of
the Moonsiff of Ounda, dated the 30th
November 1871*

Nubokishore Biswas (one of the Defendants)
Appellant,

versus

Jadub Chunder Sircar (Plaintiff) *Respondent.*

*Baboo Wopendro Chunder Bose
for Appellant.*

*Baboo Bhowanee Chunder Dutt
for Respondent.*

A Judge has no power to review his judgment on the ground of discovery of new evidence of the existence of which the plaintiff was not previously aware, without inquiry as to whether or not the plaintiff could and ought to have produced that evidence before.

The mere fact of a ryot residing in a mouzah other than that in which his land is situated does not preclude him from being treated as a resident cultivator within the meaning of Act VIII (B.C.) of 1865 s. 16.

Markby, J.—In this case the Moonsiff originally dismissed the suit on the ground that the defendant was protected from ejection by Section 16 Act VIII (B.C.) of 1865, and the Judge confirmed that judgment of the Moonsiff in a very clear judgment. Subsequently, he admitted a review of his own judgment on the ground of discovery of new evidence of the existence of which the plaintiff was not previously aware. But there does not appear to have been any inquiry as to whether or not the plaintiff could and ought to have produced that evidence before. Therefore, according to the decisions of this Court, the Judge had no power to review his judgment on that ground, and the case must stand upon the original judgment of the Moonsiff confirmed by the District Judge. Now, upon these judgments it is found that the defendant is a person who comes within the description of resident ryots as contained in Section 16 Act VIII (B.C.) of 1865, and we cannot say that, merely because it appears on

the pleadings that he resides in one mouzah and the land is situated in another, he cannot as a matter of law be treated as a resident cultivator. It may be and probably is the case that the two mouzahs are situate within the same estate, and they may also be closely adjoining to each other.

The decision of the Judge in review must, therefore, be set aside and the original judgment of the Moonsiff restored. The defendants are entitled to their costs in this Court and the Court below.

The 1st August 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock,
Sir Montague Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

*Alluvial Land—Gradual Accretion—Riparian
Proprietorship—Issues—Onus Probandi.*

*On Appeal from the High Court of Judi-
cature at Fort William in Bengal.**

Maharajah Rajendur Pertab Sahee,

versus

Lalljee Sahoo and others.

At the permanent settlement, the River Gunduck divided Mouzah Sohagpore (Zillah Tirthoot) from the village of Doomree (Zillah Sarun). In 1837, the river got into its southern channel, and a quantity of chur land to the north was resumed by Government and settled with the zemindars of Sohagpore. In 1846 it was again settled with the same zemindars, who remained in possession until 1848 when, the river having returned to its northern channel, the deara land was claimed by proprietors on the southern or Sarun side of the river. The consequence was an Act IV of 1840 suit, which was decided in favor of the zemindars of Sohagpore. In 1856, on the expiry of the last temporary settlement, the question arose with whom Government should engage for the revenue, and it was finally decided by the Board of Revenue that a settlement should be made with the zemindars of Doomree; who accordingly obtained possession. The Board's decision proceeded on two principles, viz., that an usage existed that the main channel of the Gunduck should be the boundary of the zemindaries, and that therefore the interest of the zemindars of Sohagpore had been of a limited, temporary, and conditional character.

These zemindars then brought a suit to impeach this settlement and to recover possession. After decision, appeal, and remand, it was finally decided by the High Court that the land in dispute was identical with that formerly settled with the maliks of Sohagpore who (it was assumed) had a permanent proprietary interest therein:

Held, that the proper issues to be tried were: 1st, Whether the land had been settled in 1837 with the maliks of Sohagpore as proprietors of alluvium which

had gradually accreted to their estate; or upon what other grounds such settlement was made,—the onus of proving gradual accretion being on plaintiffs; and 2ndly, Whether there was at the permanent settlement, and has been since, a clear and definite usage such as supposed by the Board of Revenue,—the burden of proving the affirmative of this being on the defendant.

THEIR Lordships regret to find that they are not at present in a condition to recommend to Her Majesty to make an order which will finally determine the long litigation between the parties to this appeal.

The appellant, the Maharajah of Hutwah, is the owner of a large estate in Zillah Sarun, which comprises a village named Doomree, and for the purposes of this appeal may be called the Doomree estate.

The respondents are zemindars in Tirthoot. Their estates comprise a mouzah called Sohagpore, and may be designated by that name.

The two zillahs are divided by the River Gunduck, which at that part of its course has a northern and a southern channel; and it is proved beyond a doubt that, during the dry months, the main body of the stream has run sometimes in the northern and sometimes in the southern channel.

In 1790-91, when the two estates were permanently settled, the Gunduck ran in the northern channel: which, their Lordships think, must be taken to have been at that time the boundary of the two zillahs, and also of the two estates—Tirthoot and Sohagpore lying on the northern, Sarun and Doomree on the southern bank of the stream.

In the year 1837 the river, whether by gradual recession or sudden shifting is not very clear, had got into the southern channel; and a quantity of chur land to the north of that channel was then resumed by Government; and after an investigation, which will be hereafter more particularly considered, a temporary settlement of it for the term of seven years was made by the Collector of Tirthoot with the zemindars of Sohagpore. This was confirmed by the Commissioner of Revenue on the 23rd of April 1838; and, in August 1846, a second settlement of this land for a term beginning on the 1st of May 1846, and ending on the 1st of May 1856, was made by the same authority with the then zemindars of Sohagpore. Under the two settlements these zemindars appear to have been in undisturbed possession until 1848, when, the river having returned to the northern channel, the deara land so settled was claimed by the appellant's father, and other proprietors on the southern or Sarun side of the river. This led to disputes, and

* From the judgment of Bayley and E. Jackson, JJ., in Regular Appeal No. 43 of 1866, decided 24th August 1866.

to an Act IV of 1840 suit, which, on the 16th of April 1849, the Magistrate of Sarun decided, in favor of the zemindars of Sohagpore, and his decision was confirmed on appeal by the Zillah Judge of Sarun on the 5th of October 1849. It appears from these proceedings that, on that occasion, the jurisdiction over the lands in question was admitted to have passed, on the change in the channel of the river, from the Tirhoot to the Sarun authorities. Both the Magistrate and the Judge, however, maintained the possession of the zemindars of Sohagpore under the subsisting settlement, leaving the Sarun claimants to establish their title by regular suit. Some such suit, as to part of the land, appears to have been brought; but the final determination in it of the question of title was prevented by the proceedings which are next to be mentioned.

On the 1st of May 1856, the last temporary settlement with the zemindars of Sohagpore expired, and the question then arose with whom the Government should engage for the revenue of the deara land. On the 7th January 1857, the Collector of Tirhoot (Mr. Lantour), entertaining in consequence of the change in the course of the river doubts as to his jurisdiction to make a new settlement, though the revenue assessed under the previous settlements had always been paid into his treasury, brought the question before the Commissioner of Patna, Mr. Tayler. That officer held a proceeding on the 3rd of March (both parties being represented before him), and came to the following conclusion:—

"In this suit I have no doubt in the matter which the Collector has referred to me for my opinion, because from the purport of the report of the Collector it is evident that the lands appertaining to the deara settled, were, without any dispute, in possession of the proprietors of Sohagpore, and the revenue has been paid by them to the Collectorate of Zillah Tirhoot. Under these circumstances, the stream of the river having been changed, the rights and interests of the proprietors cannot be prejudiced thereby. Neither can the boundary be altered, as, for instance, there is much land on this side the Ganges which still belong to Patna; therefore,

"Ordered—

"That an answer to the letter of the Collector of Zillah Tirhoot be forwarded to him, and he should act according to the directions in the said letter."

And, on the 15th of March 1857, he wrote a letter to the same effect to the Collector of Tirhoot, who re-settled the deara with the zemindars of Sohagpore by a proceeding dated the 15th of April 1857. The appellant, however, appealed against this settlement to the Commissioner, and, through him, to the Board of Revenue; and the decision of the latter body was given on the 4th of September 1857, in a letter from their Secretary, of which the following are the material paragraphs:—

"2nd.—At the time of the permanent settlement, and since then, there has been, the Board observe, a distinct and clear usage that the main channel of the Gunduck should be the constant boundary between the two districts of Sarun and Tirhoot, and between the zemindaries on each bank divided by the river.

"3rd.—In accordance with this usage, the chur, the object of the present dispute, has been twice temporarily settled with the maliks of Mouzah Sohagpore on the Tirhoot side, on which estate it was an increment, the main channel of the Gunduck being to the westward of the chur. On the expiry of the last lease, when the chur became open to settlement as if it had been a new formation, Maharajah Chutterdharee Sahai claimed the settlement to be made with him, as the lands by a change in the main channel of the river had become separated from Sohagpore, and formed then an increment on his estate within the district of Sarun.

"4th.—Local inquiries by the proper officers verified this fact; but on reference to him, Mr. Tayler, the Commissioner, directed the settlement to be again made by the Collector of Tirhoot with the maliks of Sohagpore, as they were in possession, and the lands of the chur, not having been washed away, were fully capable of identification.

"5th.—But the lessee's right of occupancy, the Board are of opinion, ceased with his lease, and Mr. Tayler's decision is not only opposed to established usage, and to Section 2 Regulation XI of 1825, but also to the principle laid in the Sudder Court's decision in the case of Rajah Greesh Chand, appellant, v. Maharajah Te2 Chand, respondent,* in which the Court disallowed the plaintiff's claim to alluvial lands which had originally formed in his estate, and had afterwards

* Sudder Dewanny Adawlut's Decisions, Vol. I, page 274.

become united to the defendant's estate by the return of the river to its former course.

"6th.—The Board would particularly refer to the note in this case, as showing the distinction between the separation by change in the course of a river of an alluvial increment not incorporated with an original estate by permanent settlement, and the separation from the same cause of a portion of original land from its parent estate, provided for in Clause 2 Section 4 Regulation XI of 1825. In the advertisement to this volume of the reports, the notes are stated to have been written or approved of by the Judges who decided the cases, and they are consequently entitled to weight.

"7th.—Under these circumstances, the Board have reversed Mr. Tayler's orders appealed against, and they will be obliged if you will direct, in case the lands remain in their present state, that the papers and proceeding may be made over to the Collector of Sarun, within whose jurisdiction the chur now lies, in order that he may form a settlement of it with the petitioner Maharajah Chutterdharee Sahai."

In conformity with the directions contained in this letter, a summary settlement of the deara lands, which are the subject of this appeal, was made with the Maharajah of Hutwah, who obtained possession of them.

The present suit was brought on the 31st of January 1860, by the zemindars of Sohagpore, to impeach the ruling of the Board of Revenue and the settlement made under it, and to recover possession of the lands in dispute.

This being the object of the suit, it is desirable to observe what were the principles laid down by the Board of Revenue, upon which the settlement with the plaintiff was set aside, the new settlement made, and the possession of the property changed. They are:—

1. That a clear and distinct usage that the main channel of the Gauduck should be the constant boundary, not only between the two districts of Sarun and Tirhoot, but between the zemindaries on each bank divided by the river, existed at the time of the permanent settlement, and had since continued to exist.

2. That the chur land, when twice settled with the maliks of Sohagpore, had been so settled with them on the ground that the river then ran in what has alone been called the southern channel, thereby making it an increment for the time being to their estate within the district of Tirhoot.

3. That by reason of the change in the

main channel of the river, the land, of which they do not dispute the identity, had become an increment of the Maharajah's estate within the district of Sarun, and accordingly ought to be settled with him.

4. That the right of occupancy of the maliks of Sohagpore, who are called lessees, ceased on the expiration of their so-called lease.

The two principles then upon which the determination of the Board, and therefore the title of the appellant rests, are the existence of the alleged usage and the inference that by reason of that usage the antecedent interest of the plaintiffs, and their predecessors in the land, was only of a limited, temporary, and conditional character.

Their Lordships do not propose to go at length into the pleadings in the suit, which appear to them to have sufficiently put in issue the propositions of the Board of Revenue. They must remark, however, that the trial of the cause has been unfortunate, inasmuch as it has failed to determine these substantial questions. The suit came originally before a Principal Sudder Ameen, who dismissed it, first, on a technical question of parties; and secondly, on the ground that the orders of the Board of Revenue were conclusive and binding on the Civil Courts. On appeal both these objections were overruled by a Divisional Bench of the High Court, which remanded the case for trial on the merits; but, in doing so, unfortunately intimated an opinion that the question to be tried was "whether (with reference especially to Clause 2 of Section 4 of Regulation XI of 1825) the lands were the property of the plaintiffs; the defendants alleging (with reference to Clauses 1 and 3 of the same Section) that the lands were their property, having been acquired by gradual accretion to their estates." The opinion thus intimated clearly implies that the principal, if not only, questions between the parties were, whether the change in the course of the river having been sudden, and the lands being capable of identification, the case fell within the second Clause; or, whether the recession of the stream having been gradual, it had taken from the Tirhoot estate what had once belonged to it, and given what it so took to the Sarun estate by accretion in the proper sense of the term. The High Court seems to have assumed that the plaintiffs may once have had the permanent and proprietary interest in the lands; and altogether to have ignored the existence of the alleged usage as an element in the case.

This seems to have misled the Principal Sudder Ameen who tried the cause on remand; for, although in one part of his judgment he treats the temporary settlements with the maliks of Sohagpore as having been made with reference to some such usage as that alleged, and, therefore, to have given them only a limited tenure, he omitted to try the issue whether the usage existed in fact. And the greater part of the judgment is devoted to the consideration of the questions whether the change in the course of the river had been sudden or gradual; and whether the land in dispute was capable of identification as the land formerly held by the plaintiffs, or had formed by gradual accretion on the appellant's estate. Deciding these questions in the appellant's favor, he dismissed the suit. The cause then came again before a Divisional Bench of the High Court, which pronounced the decree now under appeal. The learned Judges differed from the findings of the Principal Sudder Ameen as to the gradual recession of the river, and the formation of the land in dispute. They held that the latter had been shown to be identical with that which was formerly held under the temporary settlements by the maliks of Sohagpore, and had been the subject of adjudication in the Act IV case of 1849; and that it had been separated from Sohagpore by the Gunduck, causing a sudden disruption of the plaintiffs' land. Their judgment assumes that the plaintiffs had a permanent proprietary interest in the deara land settled with their predecessors in title; and does not in any way deal with the question of usage.

On the argument of the appeal, the contention between the parties finally assumed the following form:—

The case of the plaintiffs—who, coming to disturb the defendant's possession, must establish their title to do so—was, 1st, that the deara land settled with them in 1837 was so settled with their predecessors in title as the proprietors of the alluvium which had formed on their estate, subject to the right of the Government to assess revenue thereon; and that, though from its nature it continued to be subject to a fluctuating revenue, it thereupon became an integral part of their estate; and, 2ndly, that this land having been separated from the rest of their estate by a sudden change in the course of the river, and remaining capable of identification, continued to be their property.

On the other hand, the case of the

appellant was, 1st, that the deara land had not been settled with the maliks of Sohagpore in 1837 as proprietors of the alluvium, but in conformity with the usage which made the main channel of the river the boundary of the two estates; that such land had not been shown to have been formed by gradual accretion on the Sohagpore estate, which could alone give the maliks of that estate a right to claim it as proprietors; and that, by virtue of the alleged usage when the northern channel became, in 1847, again the main channel of the river, the deara land ceased to belong to Sohagpore, and became part of the estate of Doomree, the temporary settlements having given to the maliks of Sohagpore at most only a right of occupancy during their subsistence. The appellants, moreover, as their Lordships understood, did not abandon the defence founded on the findings of the Principal Sudder Ameen to the effect that the return of the river from the southern to the northern channel had been gradual and not sudden; that the lands in dispute were incapable of being identified as those settled with the maliks of Sohagpore, but had been formed by gradual accretion on the estate of Doomree, and were therefore an increment to that estate under the general law of alluvium.

Of this latter part of the appellant's defence their Lordships propose finally to dispose.

Upon a full consideration of the evidence they are of opinion that the High Court was right in holding that the land in dispute has been shown to be identical with that which was the subject of the Act IV case of 1849, and therefore with that which was the subject of the settlements of 1837 and 1846; and to have been separated from Sohagpore by a sudden change in the course of the main stream of the river. They agree with the High Court in thinking that, on this latter point, the conclusion of the Magistrate, formed when the change was recent, is to be preferred to that of the Principal Sudder Ameen.

The necessary consequence of this finding of their Lordships is that the plaintiffs are entitled to follow their lands across the stream, under the second Clause of the fourth Section of Regulation XI of 1825, unless they are prevented from doing so by force of the alleged usage, being a clear and definite usage within the meaning of the second Section of the Regulation; or by reason of their never having had the proprietary right in the soil. Upon the latter point

it was argued for the appellant that the proprietary right in the soil may all along have remained in the Government; which, though it made the two temporary settlements with the maliks of Sohagpore, may have retained and lawfully exercised the power of settling with the proprietors of Doomree on the expiration of the last of those settlements. Their Lordships, however, are unable to find in the settlement proceedings, or in the rest of the record, any evidence that the Government ever asserted a title to the land as a chur thrown up in a navigable river, or as being wholly or in part the bed of the river. The first settlement certainly purports to have been made with the then maliks of Sohagpore in the character of "proprietors" of the alluvial land settled; but, in their Lordships' opinion, it is doubtful whether they were treated as proprietors by reason of the alleged usage, or because the deara land was supposed to have formed by gradual accession on their estate, and to have become an increment thereto within the meaning of the first or of the latter part of the third Clause of Section 4 of Regulation XI of 1825. Their Lordships have not before them the whole settlement proceedings; and the Board of Revenue, which presumably had access to them, has stated that the settlements were made in accordance with the supposed usage. The proceedings which are before their Lordships are not altogether inconsistent with this proposition. On the contrary, they contain passages which seem to favor it; though they do not, taken as a whole, support the finding on this point of the Principal Sudder Ameen.

From what has been said above, it plainly appears that the material thing to be determined in this case was the existence of the alleged usage. Yet the issue upon that point has never been tried. Their Lordships may observe that the admitted or proved existence of such an usage was the basis of the decision cited from the 1 Sudder Dewanny Adawlut decisions in the letter of the Board of Revenue;—a case which, remarkably like the present in many of its circumstances, was decided many years before the passing of Regulation XI of 1825 upon the principles afterwards embodied in that statute.

Again, from what has been said above, it also appears that, in their Lordships' opinion, some further inquiry is necessary touching the settlements of 1837 and 1846; the grounds upon which the maliks of Sohag-

pore were treated as the persons entitled to settle; and the nature of the proprietary interest in the alluvium then recognized in them. If it should clearly appear that the Revenue officers then dealt with them as persons who had acquired a proprietary interest in the accretions under the provision of Clause 1 or 3 of Section 4 of the Regulation, their Lordships are of opinion that this should be held to be sufficient evidence of their proprietary title. Their Lordships do not think that it would be right to cast upon them the burden of proving at this distance of time that the lands settled had, in fact, been formed by gradual accretion. If, on the other hand, it should appear that the alleged usage exists, and that the settlements were made on the basis of it, or that for any other reason the interest of the maliks of Sohagpore in the same land was of a limited and temporary character, and had expired, that would be fatal to the plaintiffs' suit. But these are questions for the determination of which their Lordships have not now before them the necessary materials.

Upon the whole, then, their Lordships have reluctantly come to the conclusion that it is their duty to advise Her Majesty to reverse the decree under appeal and to remit the cause to the High Court with instructions to cause the following issues to be tried; and to pronounce a decree according to the findings upon such issues in the manner provided by Section 354 of the Code of Civil Procedure. The issues are:—

1st.—Whether the land in dispute was settled in 1837 with the then maliks of Mouzah Sohagpore as the proprietors of alluvium which had become an increment to their estate by gradual accretion; or upon what other grounds was such settlement made. The burden of proving the affirmative of the first part of this issue to be on the plaintiffs.

2ndly.—Whether there was at the date of the permanent settlement, and has since been a clear and definite usage that the main channel of the River Gunduck should be the constant boundary, not only between the districts of Sarun and Tirhoot, but also between the zemindaries on each bank divided by the river. The burden of proving the affirmative of this issue to lie on the defendant (the appellant). Each party is to be at liberty to produce such further evidence on these issues as he may think necessary; and their

Lordships will also recommend that the costs of this appeal on both sides be taxed, and the amount thereof certified to the High Court; and that it be part of the order that such costs be costs in the cause.

The 26th August 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act IX of 1871 s. 27—Limitation—Jurisdiction—Special Appeal.

Cases Nos. 965 and 966 of 1873.

Special Appeals from a decision passed by the Additional Subordinate Judge of Dacca, dated the 19th February 1873, reversing a decision of the Moonsiff of Moonsheegunge, dated the 21st December 1872.

Trilochun Chatterjee and another (Plaintiffs)
Appellants,

versus

Rash Mohun Chatterjee and others
(Defendants) *Respondents.*

Baboo Doorga Mohun Doss for Appellants.

Baboo Kashee Kant Sen for Respondents.

A suit to remove obstruction to a right of way having been amicably settled, the plaintiffs were still unable to enjoy use of the way. A second suit was accordingly brought; but it was dismissed on the ground of limitation. The Judge reversed the decision, holding that Sections 2 and 3 Act IX of 1871 had not come into force. The Moonsiff who tried the case on remand decreed the claim. In appeal, the Subordinate Judge decided the case in strict conformity with illustration B, Section 27 of the above Act. In special appeal it was held:—

That though it would have been more correct if the Subordinate Judge had accepted the Judge's decision on the point of limitation, yet, as the Subordinate Judge's decision was right in law, the High Court was bound to dismiss the appeal:

And though the Court below might have dealt with the suit as if it had been a revival of the previous suit which ended in compromise, yet, as this was not done, the High Court could not do so in special appeal.

Jackson, J.—THE decision of the Lower Appellate Court in this case is in strict conformity with illustration B, being a case decided by the Legislature upon Section 27 of the Limitation Act. It is contended that the Subordinate Judge had no authority to decide the question in this way, because the same point had been raised at an earlier stage of the case and decided the opposite way by the Judge. No doubt it would have been more correct if the Subordinate Judge had accepted the decision of the District Judge as absolving him from coming

to any distinct finding on that point, leaving the parties to appeal to the High Court; and that the Subordinate Judge was well aware of this, we may perceive from the ingenious reasoning by which he excuses his judgment; but that is not the question before us. The question before us now is whether the judgment of the Subordinate Judge is right in law. We think it is right, and we are bound therefore to dismiss this special appeal.

It is also argued that, regard being had to the circumstances of the case, the Court below might have dealt with the suit as if it had been a revival of the previous suit, which ended in compromise and afterwards formed the subject of a fresh suit. It is unfortunate, no doubt, that the procedure was not resorted to when the compromise was set aside; but it is not possible for us now in appeal from the decision of the Lower Appellate Court to declare this to be in any way a revival of the former suit.

We do not think it fit to make any order as to costs in this case.

The 29th August 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Act XI of 1858 s. 7—Jurisdiction—Property of Minors—Certificate—Purda-nusheens.

Case No. 211 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 21st June 1873.

Mussamut Kuruppool Kooer and another
(Petitioners) *Appellants,*

versus

The Collector of Shahabad (Objector)
Respondent.

Mr. J. T. Woodroffe and Baboos Mohesh Chunder Chowdhry, Romesh Chunder Mitter, and Aubinash Chunder Banerjee for Appellants.

Baboo Unnoda Pershad Banerjee for Respondent.

The powers given by Sections 10, 11, and 12 of Act XI of 1858 only accrue upon the happening of the contingency which is mentioned in Section 9, and the mere fact that a near relative who desires to have the charge of the property is *purda-nusheen*, is not of itself a disqualification such as would take away the right to claim the certificate under Section 7.

Phear, J.—We think that the Judge has somewhat misapprehended the extent of the discretion which is vested in him by Section 12 Act XI of 1858. It will be seen upon consideration of all the Sections of the Act taken together, that the powers given by Sections 10, 11, and 12, only accrue upon the happening of the contingency which is mentioned in Section 9.

Section 9 is in these words :—"If no title to a certificate be established to the satisfaction of the Court by a person claiming under a will or deed, and if there be no near relative willing and fit to be entrusted with the charge of the property of the minor, and the Court shall think it to be necessary for the interest of the minor that provision should be made by the Court for the charge of his property and person, the Court may proceed to make such provision in the manner hereinafter provided."

And it is also plain from Section 7 that in the event of there being no person claiming a right to have charge of the property of the minor under a will or deed, then a near relative of the minor who is willing and fit to be entrusted with the charge of his property, has a right to call upon the Court to give him a certificate. It appears from the affidavit which has been put in on the part of the appellant in this case that there is a very near relative of the minor who is willing and desirous to obtain charge of his property. That being so, if this relative is fit to have that charge, she is entitled to have the certificate granted to her; and the Judge has not the discretion, which it is the purpose of Section 12 to confer upon him in the event of there being no fit and qualified person and near relative to take charge of the property. The Judge has not tried the question whether the appellant is a fit and proper person to take charge of the property. He has avoided the question altogether by making the remark that it does not appear necessary to examine the witnesses on the point; that is, as the Judge states it :—"The competency of the women to manage the estate themselves, seeing that the women are *purda-nusheen*, witnesses can know very little in the matter." He adds :—"The result of my experience convincing me that the only result of making over the management of large property to women, whose habits of life necessarily unfit them for the affairs of the world, is to enrich the dewan and amlah and impoverish the minors, under no

"circumstances would I deem it advisable to make over an estate of this extent to two women to manage."

It seems to us that the mere fact that the near relative who desires to have the charge of the property is *purda-nusheen*, is not of itself a disqualification such as would take away the right to claim the certificate under Section 7. There can be no doubt that many *purda-nusheen* ladies do manage property exceedingly well; and if a *purda-nusheen* lady is the nearest relative, and is in every way qualified to take charge of the property of the minor, she ought to have the certificate granted to her, notwithstanding she falls within the class of *purda-nusheen* women.

We think that the Judge's order must be set aside, and the matter must be sent back to the Judge for re-consideration. He must first try the question whether the applicants or either of them are willing and fit to be entrusted with the charge of the property of the minor; and it is only in the event of his coming, upon a fair and full consideration of the evidence which may be put before him, to a negative conclusion upon this point, that he ought to consider the propriety of directing the Collector to take charge of the estate. There will be no order in respect of costs.

The 3rd September 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges*.

Regulation VII of 1825 s. 7—Irregular Attachment not necessarily void—Limitation—Act XIV of 1859 s. 1, cl. 5.

Case No. 238 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 28th June 1872.

Bibee Khodajamissa (Plaintiff) *Appellant*,
versus

Mr. R. F. Stevens and others (Defendants)
Respondents.

Baboo Mohesh Chunder Chowdhry, Romesh Chunder Mitter, and Mohinee Mohun Roy for Appellant.

The Advocate-General and Baboo Unnoda Pershad Banerjee, Sreenath Doss, and Bungshee Dhur Sen for Respondents.

In 1862 K. sued A and M to recover the amount with interest of a bond executed by M (who was A's general agent) in the name of H, on the permission of plaintiff,

for the purpose of paying off the debts of A. The Principal Sudder Ameen decreed the case against M with costs, and released A from K's claim. In appeal to the Sudder Court, the plaintiff obtained a decree with interest and costs against A, as well as against M. In execution, K prayed, on 2nd December 1858, for the attachment and sale of certain estates. A notice having been ordered to issue, K represented that the judgment-debtor was attempting to alienate her estates, and prayed that orders might be passed to prevent alienation of the estates mentioned in her application for execution. A process of attachment was issued accordingly on 28th March 1859, but without security being first demanded, as prescribed in Regulation VII of 1825 Section 7.

In September 1861, one B A, who had, objected to the attachment, petitioned the Judge and obtained an order dated 14th September 1861 releasing the attached properties as being his in virtue of a *hibbanamah* from A and in his possession. From this order K appealed, but the appeal was struck off on 29th November 1862. On review the first order was upheld, but it was declared that this would not be a bar to a regular suit. She accordingly sued for a reversal of the Judge's order, for the cancelment of the deed of gift as being collusive, and for the sale of the property in question as that of her judgment-debtor A. The suit was decreed, and an appeal preferred to the High Court:

Held, that the order of 28th March 1859 was wrong in ordering attachment without first requiring security; but the irregularity did not affect the jurisdiction of the Court or render the attachment void.

Held, that plaintiff had a right of appeal from the order of 14th September 1861; that the appeal was wrongly rejected on 29th November 1862, and it saved her from the operation of the law of limitation while it was pending; and as she brought her suit within a year from that time, she was within the period prescribed by Act XIV of 1859 Section 1 Clause 5.

Couch, C.J.—THIS suit was brought by Khodajamnissa Bibee, the widow of Moonshee Fuzlul Kureem, to set aside a summary order passed by the Judge of Jessore on the 30th of April 1870, and to declare that the fraudulent deed of conditional sale of the 10th of Assin 1268 executed and delivered by Baker Ali Chowdhry, and an agreement executed and delivered by Bibee Ashrufoonnissa, and the decree made thereon, dated the 30th of December 1865, and the appeal which was preferred against that decree and which was struck off the file on the 5th of February 1868, constitute no bar or obstacle to the auction-sale of talook Delhee Satgachia Shibrapore, Pergunnah Mahomedshahye.

The proceedings out of which this case arose began in 1852, by a plaint filed in the Court of the Principal Sudder Ameen of 24-Pergunnahs, in a suit by Khodajamnissa Bibee, the present plaintiff, against Ashrufoonnissa, the widow of Soonee Mollah. The plaint stated that Bibee Ashrufoonnissa appointed the other defendant (the Moonshee defendant, as he is called) her general agent for the purpose of protecting her property and liquidating her debts, and that the agent executed a bond on the 16th Pous 1258 in the name of Moulvie Hafzooddeen Hossein,

on the permission of the plaintiff, for the purpose of paying off the debts of the then defendant Ashrufoonnissa, and claimed to recover Rs. 12,000, the principal amount of the bond, with interest.

The Principal Sudder Ameen by his decree, dated the 8th of July 1854, ordered that the case should be decreed against the Moonshee defendant, and that he should pay to the plaintiff the amount which she claimed with interest and the costs, and that he should also pay the costs of the defendant Hafzooddeen Hossein, and that the Bibee defendant, as she is called, meaning Ashrufoonnissa, should be released from the plaintiff's claim, and get her costs.

There was an appeal from that decision to the Sudder Dewanny Adawlut, which Court, after hearing the appeal, stated in its judgment:—"We think, therefore, that the plaintiff (appellant), that is, Khodajamnissa Bibee, is entitled to have the decree of the Lower Court amended according to her prayer, and we adjudge the sum claimed against Bibee Ashrufoonnissa with interest upon the consolidated debt and costs from the date of the decision of the Lower Court.* * "The order passed by the Principal Sudder Ameen with respect to Moonshee Fuzlul Kureem is not interfered with." The result, therefore, of the appeal was that the present plaintiff obtained a decree for the amount which she claimed against Ashrufoonnissa, as well as against the other defendant.

Proceedings were subsequently taken for the execution of that decree. On the 2nd of December 1858, Khodajamnissa presented a petition to the Court, in which, having stated the institution of the suit by her, the decision of the Principal Sudder Ameen, and her appeal from his decree to the Sudder Dewanny Adawlut, and the decision of a Full Bench of that Court, she prayed that notice might be duly served on the judgment-debtor, the defendant, and the principal amount of the decree, the costs of the two Courts, and interest up to the date of payment, and the costs of the present execution, might be ordered to be realized by the execution of the decree, and the attachment and sale of the estates mentioned in the schedule annexed to the petition, in which was the estate in question in this suit described as "No. 171, Delhee Satgachia Shibrapore."

On the 8th of March 1859, it was ordered by the Principal Sudder Ameen that a notice should be first issued on the judgment-debtor according to practice, and on the 11th of March Khodajamnissa presented a petition

to the Court, in which, having stated her previous petition for the execution of the decree of the Sudder Dewanny Adawlut, and that notice had been ordered by the Court to be duly served on the judgment-debtor, she said:—"Now I have come to know that the said judgment-debtor is attempting to alienate and to make a *benamee* transfer of her zemindaree and other estates, with the object of defrauding me of my money and to harass and deprive me of it. Whereas the judgment-debtor is a *purda-nusheen* woman" (referring to Ashrufoonnissa), "and if she alienates and makes a *benamee* transfer of the estates which are in her possession and held in her own name, I have no other means of realizing the amount of my decree. I therefore present this petition according to the provisions of Section 8 Regulation II of 1806, and Section 7 Regulation VII of 1825, and pray that evidence may be taken from me, and proper orders be passed that the estates mentioned in the schedule of the petition for execution of decree may not be alienated until the amount of my decree be realized."

On the 28th of March 1859, there was a proceeding in which it is stated that a notice had been served on the judgment-debtor in Zillah Jessore, and that the decree-holder had presented a petition alleging that the judgment-debtor was attempting to alienate the property, and praying for proper orders to be passed prohibiting an alienation of the estates, being the petition we have just referred to: and it continues:—"Whereas, according to the request of the decree-holder, it is necessary to attach the estates mentioned in the first petition for execution of decree, it is therefore ordered that a process of attachment do issue for the due attachment of the said estates," not following the terms of the Regulation and ordering the attachment on default of security being given, but at once directing that an attachment should issue.

This was followed by proceedings in which it appears that an attachment of the property was made; and on the 22nd of June 1859 an order was made that the nazir should duly attach the property of the judgment-debtor as pointed out by the decree-holder, and submit a report thereof. What is apparently the report follows, in which it is stated that the peon appeared and stated that he went with the process of attachment to the mofussil and attached, in the presence of the villagers, out of the properties mentioned in the *hookumnamah*, those which were

under attachment. And it says:—"On the attachment being made, the villagers stated that Meer Baker Ali Chowdhry has been in possession of those attached properties for two or three years by virtue of a *hibbah* (deed of gift), and the men on behalf of the decree-holder did not point out any property of Rs. 2-8, Rs. 5-1, Rs. 1-7, and of Rs. 45-9-3, and the judgment-debtor has no right or land in the village of Nowalidanga."

The attachment apparently having been thus made, on the 4th of September 1861, Meer Baker Ali, whose name was mentioned in the report of the attachment, presented a petition to the Court of Jessore, in which he stated that "the decree-holder has attached out of the properties mentioned in my deed of gift, and which were in my possession, the kharija talooks, No. 194, Turruf Mullickpore, No. 141, Turruf Koolchana, and No. 179, Dehee Saigachia Shibrapore, in Pergunnah Mahomedshahye, as the property of the judgment-debtor, Bibee Ashrufoonnissa. The judgment-debtor has no right to nor possession of the said attached properties, and she is not in possession thereof. * * I presented a petition of objection and gave documents and other evidence, but without taking them into consideration he rejected the petition on mere suspicion and presumption. I could not appeal according to Act VIII which is in force, and so I could not raise objections in this case. Now, because Section 364 of the said Act has been repealed by Act XXIII of 1861, I am authorized to appeal, and so I have preferred a separate appeal in respect of that matter. I file the petition of objection in this case, together with the original document, and pray that the auction-sale of the said attached properties may be stayed till the final decision of my appeal, and that, after taking from me the documentary and other evidence, the case be tried and the property covered by my deed of gift be ordered to be released."

This, as we have said, was presented on the 4th of September: on the 7th of September 1861, the hearing of the petition came on before Mr. Justice Kemp, who was then Judge of the Civil Court of Jessore. In his decision he says:—"The objector urges that the properties attached, and which it is proposed to sell in satisfaction of the decree held by Bibee Khodajamnisia against Bibee Ashrufoonnissa, are not the property of the latter Bibee, but his

"property in virtue of a *hibbanamah*, and that he is in possession.

"Looking to the fact of possession alone, I find that the objector has made good his plea. His name has been registered by the Collector in the register of mutations, a proof of possession; he has filed numerous registered kubooleuts and other documents, showing that he is in possession of the attached properties. If the decree-holder wishes to put in issue the *bona fides* of the *hibbanamah* granted by Ashrufoonnissa Bibee to the objector, he must sue regularly. The properties advertized for sale must be released from the lotbundee. The objector will recover costs from the "decree-holder."

This order was made on the 14th of September 1861. On the 25th of November 1863, the present plaintiff, Khodajamuissa, instituted a suit against Ashrufoonnissa and Baker Ali Chowdhry, in which she stated that she had presented an application for execution of decree in the Court of the Principal Sudder Ameen of 24-Per-gunnahs, in order to realize the decretal amount due to her; that the property of the Bibee defendant was attached, and the sale proclamation having been issued, the Chowdhry defendant objected that he was entitled to the said property by virtue of a deed of gift, and the Judge holding the said objection to be valid, released the property from attachment on the 14th September 1861; that she preferred an appeal from the said order to the High Court under the old law, inasmuch as the original case was instituted and tried under the old law; but no evidence on that point having been filed, the said appeal was struck off on the 29th of November 1862; that she applied for a review of judgment, but the former order was upheld, and it was ordered that the said order will not be any bar to the institution of a regular suit. Then she said:—"Therefore, the cause of action arose from the above-mentioned date, and the present suit is instituted for a reversal of the said summary order of the Judge, for the cancelment of the collusive deed of gift, for the realization of the amount of the decree by establishment of the right of the judgment-debtor, defendant to, and for the auction-sale of, these talooks, viz., No. 179, Satgachia Shibrampore," &c. Upon that an order was made by the Principal Sudder Ameen on the 29th of June 1864, "that this case be decreed in favor of the plaintiff; that the amount of the decree due to the plaintiff

"will be realized by the auction-sale of the properties covered by the defendant's deed of gift and from such sale proceeds; and that the costs of both parties, together with interest on the plaintiff's costs from this day to the date of payment, at the rate of one per cent. per month, be paid by the defendants."

The real defendants in this suit are persons who claim under a mortgage executed by Baker Ali Chowdhry, and a deed of gift executed by Bibee Ashrufoonnissa, to which we shall afterwards refer.

Upon these proceedings, two questions arise; first, whether the property was attached; and secondly, whether the suit which Ashrufoonnissa brought, and in which the order of the 29th of June 1864 was made, was brought within proper time.

The order of the 28th of March 1859 was, as we have mentioned, wrong in ordering the property to be attached without first requiring security, according to Section 7 of Regulation VII of 1825. That ought to have been done; and it was only in the event of the security not being given that the property should have been attached. Then the question is, whether this is more than an irregularity.

The Court to which the application was made for the attachment had power to issue it, and jurisdiction was given to it by the application which was made to it to proceed under the Regulation. In making the order to attach the property without requiring security, there was no doubt an irregularity; but it did not affect the jurisdiction of the Court, and no objection appears to have been taken to it by any of the parties who were interested in doing so. Baker Ali Chowdhry, in his petition of the 4th of September 1861, which is evidence against the defendants, because they are claiming under him by virtue of instruments which were executed shortly after that time, states that the property was attached, and treats it as a valid attachment against the property of Ashrufoonnissa, only alleging that the property had become his by the deed of gift. The mortgage to the defendants was on the 25th of September 1861—three weeks after he presented the petition. We think, therefore, that the defendants cannot say that this attachment was void in consequence of the defendant not being required, in the first instance, to give security. The decision of the Sudder Court, Sudder Dewanny Adawlu, 1857, page 777, which was referred to, cannot be considered by us as a binding

authority that it is void. There was a difference of opinion in that case, and we agree with Mr. Trevor who was of opinion that the attachment was not void.

The next question is, whether the suit which was brought on the 25th of November 1863, to establish the right of Khodajamissa to attach the property and to set aside the deed of gift to Baker Ali and the decision of Mr. Justice Kemp, was in time.

It would seem that Section 387 of Act VIII of 1859 was overlooked; for Baker Ali appears to have supposed that until the change in the law by Act XXIII of 1861, he could not bring any appeal against the rejection of his claim. But Section 387 saved proceedings in a pending suit; and Baker Ali having made his objection and put forward his claim, it was in the nature of a suit, and was to be treated as a suit, and it was pending at the time Act VIII of 1859 came into operation. The attachment was made on the 22nd of June 1859, and Act VIII came into operation on the 31st of July 1859; and he made his claim immediately upon the attachment being made. He seems to have thought or been advised that Section 364 of Act VIII prevented his appealing, and that he could not do so until that Section was repealed by Act XXIII of 1861.

The plaintiff, no doubt, had a right of appeal from the order of the 14th of September 1861. This was an order made by Mr. Justice Kemp releasing the property from attachment; and it appears to us that the appeal was wrongly rejected on the 29th of November 1862. We have not in the proceedings any judgment showing the grounds of this rejection; but we must consider that the appeal which the plaintiff was entitled to bring, and which was thus wrongly rejected, would save her from the operation of the law of limitation during the time it was pending. She brought the suit, in which the order was made to set aside the deed of gift to Baker Ali, within a year from that time, and therefore within the time prescribed by Clause 5 of Section 1 of Act XIV of 1859. And the order which was made in the suit which she brought was sufficient to remove the effect of the order of Mr. Justice Kemp and to establish her right against the parties to that suit, namely, Ashrufoonnissa Bibee and Baker Ali Chowdhry. Apparently, she did not know about the mortgage which had been made on the 25th of September 1861, and therefore she did not make the present defendants

parties to the suit, and they are not bound by the decree. She has consequently had to bring the present suit to establish her right against them.

It is to be observed that this mortgage by Baker Ali was made only eleven days after the order of Mr. Justice Kemp releasing the property from attachment; but that order only released the property in favor of Baker Ali Chowdhry and did not authorize Ashrufoonnissa Bibee to make any alienation of it. The case, therefore, of the plaintiff is that this talook, Dehee Satgachia Shibrampore, was attached in execution of her decree against Ashrufoonnissa Bibee, and that it was rightly attached and was really the property of Ashrufoonnissa.

As we have already mentioned, the admission of Baker Ali Chowdhry, which was made before the mortgage to the defendants, and was therefore evidence against them, shows that the property did formerly belong to Ashrufoonnissa Bibee; and his petition also shows that he claimed under a deed of gift from her. It shows further that in the first instance his claim was rejected by the Court, and although that was afterwards reversed on the appeal, it was not reversed on the ground that the Court was satisfied of the validity of the deed of gift, but simply on the fact of possession. The present plaintiff subsequently obtained a decree that the property should be sold, having alleged that the deed of gift was collusive.

This appears to us to be a sufficient *prima facie* case to require the defendants to show what their title was, and to establish that they had a good title derived from Ashrufoonnissa.

One part of their title was the deed of gift to Baker Ali Chowdhry; because they took the mortgage from him. Although they took an instrument, which may be described as a confirmation, from Ashrufoonnissa Bibee also, there is no evidence in the present suit of the deed of gift, nor is there any admission of one. We mean any admission of a valid deed of gift, because the plaintiff has always alleged that this was an invalid deed and given collusively. No issue was framed in this suit whether there was a valid deed of gift. This was probably owing to the form of the plaint, and also to the defence which was made in the written statement of the defendants, which we will refer to.

The defendants stated that "the predecessor of the minors having at first obtained *bonâ fide* and in good faith a

"mortgage executed by Baker Ali Chowdhry of the disputed property, which was known in the Collector's serishtah, for an actual and fair consideration, and having afterwards received an *ekrar* admitting the said mortgage from Bibee Ashrufoonnissa, applied for foreclosure of the mortgage on the expiration of its term; and when the mortgage was foreclosed, after time had been granted repeatedly, he instituted a suit for possession, and on obtaining a decree entered into possession thereof. He was not aware of the attachment alleged by the plaintiff, and, in fact, there was no attachment. The plaintiff's allegation that the said transactions are fraudulent are therefore false."

"The judgment passed in the regular suit, in which, as alleged in the plaint, the *hibbah* obtained by Meer Baker Ali was set aside, cannot at all be any evidence against the minors, as their predecessor was no party to that suit."

Here the defence is rested upon there being a mortgage "*bonâ fide*" and in good faith," to these defendants by Baker Ali, and a confirmation by Ashrufoonnissa Bibee; and the allusion to the deed of gift of Baker Ali is only, that the defendants contend that the judgment passed in the suit of the plaintiff could not be evidence against them, inasmuch as their predecessor was not a party to the suit. They seem to have considered that this was the only question which arose about the deed of gift; and that probably, accounts for no issue being framed as to it in the first Court. But no suggestion has been made that the defendants, the respondents, have been prejudiced by the omission to frame an issue on this subject, or that they omitted to give any evidence because there was no issue. The plaintiff had alleged in the plaint that Baker Ali had no right or title to make the mortgage, and therefore it was the duty of the defendants, if they alleged that he had a right or title, to have shown it. The validity of the deed of gift, or the validity of the title of Baker Ali, had been distinctly challenged in the plaint. The *ekrar*, which was executed by Ashrufoonnissa on the 25th of September 1861, stated that she made a deed of gift in favor of Baker Ali on the 14th of Assar 1264 (the 27th of June 1857), which was about two months after the decree of the Sudder Dewanny Adawlut, declaring that she was liable for the money and making her property liable to be attached in execution. It is a significant fact that this deed of gift, the

validity of which is in question, was made just after the decree was passed by the Sudder Dewanny Adawlut; and it would certainly require evidence of some weight to satisfy a Court that it was a *bonâ fide* transaction, and had not been made for the purpose of enabling her to protect her property from being taken in execution of the decree which had been just obtained against her after considerable litigation.

Again, the circumstance that these mortgagees not only took a mortgage from Baker Ali, but considered it right to take the *ekrar* from Ashrufoonnissa, shows that at that time they thought that the title of Baker Ali was liable to be disputed. The *ekrar* says:—"I do hereby write and agree that, God forbid, should there in future be any objection against the *hibbah* of Meer Baker Ali on account of my personal debts," which is the very matter in which there was likely to be a dispute, "then I shall, agreeably to the terms of the said *kut-kobalah* executed by Baker Ali, pay down the above-mentioned amount."

Thus we have in this *ekrar* evidence that the defendants, the mortgagees, had information at that time which made them doubt the validity of the deed of gift.

Two witnesses have been examined in support of the defendant's case, Kali Chand Mitter and Gopal Chunder Pal. The former said that Baker Ali having, in the beginning of Assin 1268, taken Rs. 26,000 from Omesh Chunder and Kali Doss Roy, executed a *kut-kobalah* in their favor in respect of Turruf Satgachia Shibrampore, and that the document was written in the name of Eshur Chunder Bose, and "the entire money had been paid in cash. I cannot say what were the number of bags in which the money had been kept."

The latter, Gopal Chunder Pal, said that the *kut-kobalah* was executed for a consideration of Rs. 26,000; that the said money belonged to Omesh Baboo; that the execution of the document, as well as the receipt and payment of the consideration-money, took place at the lodging-house of a mookhtear at Jessore; that Baker Ali himself affixed his seal and signature in Persian characters on the *kut-kobalah*, and Ashrufoonnissa affixed her seal in person, and her mookhtear, Huro Chunder, wrote her name on the *ekrar*. Then he said, what appears to be not altogether credible:—"Giri Dhur Sen, Giri Dhur Bosu, and Sristidhur Poddar, brought the money upon carts, and the said Poddar having weighed them by a scale, made the

"payment. The mookhtear of the debtor took the said money."

Besides these two witnesses, there was the deposition of a witness taken in the suit for foreclosure brought by the mortgagees against Baker Ali, to which the plaintiff was not a party, and which, therefore, was not admissible in evidence against her. It seems to have been admitted, and therefore we refer to it, and the defendant having put it in the plaintiff is entitled to use any part of it that is favorable to her case. It is the deposition of Gyratoollah, taken on the 9th of November 1868, and after deposing to the execution of the mortgage and the *ekrar* of Baker Ali and Ashrufoonnissa Bibee, and the payment of the money which, he says, was made in his presence, and that it had been carried by a cart, he said, on being questioned by the plaintiff's pleader:—"Bibee Ashrufoonnissa having granted her entire estate to Baker Ali under the *hibbah*, and there being a suit pending in Court in respect of that *hibbah*, it was on this ground, that is to say, on account of the suspicion as to whether the *hibbah* shall be deemed valid by the Court or not, that Eshur Chunder Bose took an *ekrar* from Bibee Ashrufoonnissa. Baker Ali Chowdhry is the foster-son of Bibee Ashrufoonnissa; but both of them lived in communality in one and the same house, and enjoying the profits of the zemindari, &c. The aforesaid Baker Ali lived with the said Bibee in the same manner until her death."

This is important evidence with reference to the validity of the deed of gift. It shows that there was the relationship of foster-son on the part of Baker Ali to Ashrufoonnissa; that after the deed of gift they lived in the same house together, and enjoyed the profits of the property, and that this continued until her death, raising a strong suspicion that this was not a *bonâ fide* transaction on her part, but was a making over of the property to him to protect it from her creditors. And the witness says that the mortgagees took the *ekrar* from her on account of the suspicion as to whether, in the suit that was pending, the *hibbah* would be admitted to be a valid one or not,—showing that they had notice of these circumstances, and cannot be considered as persons who took this mortgage *bonâ fide*, and without notice of the question whether Baker Ali was really entitled under the deed of gift, and that it might be avoided by the person who had made a decree against Ashrufoonnissa.

The evidence which has been given by the defendants proves very little in support of the *bonâ fides* and reality of the transaction; for it does not seem likely that they would lend Rs. 26,000 upon the security of property the title to which was under suspicion, and would become mortgagees of property which had been attached, and which it was not unlikely would be afterwards sold in execution of the decree of the present plaintiff. There is nothing in their evidence which is not consistent with the mortgage having been a colorable transaction to strengthen the title of Baker Ali, the title which would be set up against the execution of the present plaintiff, and the transaction was entered into immediately after the property had been released from the attachment by Mr. Justice Kemp. If the mortgagees had thought fit to look into the proceedings in which the order of Mr. Justice Kemp was made, they would have seen at once that the foundation of Baker Ali's title, the deed of gift, was still in dispute; and that Mr. Justice Kemp had abstained from giving any decision as to the *bonâ fides* of it, and had referred the parties to a suit in order to have it set aside.

So far as appears here, the mortgagees, with that knowledge, do not seem to have obtained any evidence of the circumstances under which the deed of gift was made, the consideration that was given for it, or any facts which would help to show that it was a valid instrument.

They have not attempted to produce it in this suit, and by their written statement, which we have already read, they seem to have supposed that if they could get rid of the effect of the judgment in the other suit, and show that it was not evidence against them, that would be sufficient, and that they need not prove the validity of the deed. We cannot tell why they abstained from giving this evidence; they may have considered that it was impossible to prove that the deed was valid. But we do not draw that inference from their conduct. It is enough that they were called upon to show that this was a valid deed of gift, and to give some evidence in support of it. It was not for the plaintiff to do more than she has done by presenting a *primâ facie* case, which threw enough suspicion upon the transaction to require the defendants to prove its validity. All the circumstances which appear in this case lead to the conclusion that the gift to Baker Ali was really made to defeat the present plaintiff in the execution of her decree of the Sudder Court, and I think (and I am

giving the opinion of the other two learned Judges who are not here now, but who have seen the notes of this judgment and agree in them) that the mortgage was fraudulently made with a view to defeat the suit which the parties must have known the plaintiff would bring after the decision releasing the property from attachment, and that they have failed to establish their title, and the plaintiff is entitled to a decree, as she prays for establishing her right to recover the money which she claims by selling the property in execution of her decree. She must also have the costs of this suit, including the appeal. The decree of the Subordinate Judge will be reversed.

The 12th September 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Order by Appellate Court—Acceptance by Parties.

Case No. 1932 of 1872.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 30th August 1872, reversing a decision of the Deputy Commissioner of Maunbhoom, dated the 21st March 1872.

Rajib Sarkhel and others (Defendants)
Appellants,

versus

Rajah Nil Monee Sing Deo (Plaintiff)
Respondent.

Baboos Kalee Kishen Sen and Bama Churn Banerjee for Appellants.

The Advocate-General and Baboo Bhowanee Churn Dutt for Respondent.

Where an Appellate Court, instead of deciding upon an appeal, refers the appellant to a fresh suit, the order, whether right or wrong, if accepted by the parties, is binding upon them.

Markby, J.—It seems to us that it would be sufficient to say in this case that the point now taken, namely, that the suit is barred by Section 2 of Act VIII of 1859, was expressly abandoned in the first Court, as appears by the judgment of the Deputy Commissioner.

But even had it been still open, we think the contention altogether untenable. Not

because in the former case the Rajah was called a *pro forma* defendant, for we know of no difference between *pro forma* and other defendants, but because the Judicial Commissioner, instead of deciding upon the Rajah's appeal, referred him to a fresh suit. Whether that order was right or wrong, it was accepted by the parties and is binding upon them.

The decision on the merits is in accordance with the law as to the effect of long possession, and the appeal must be dismissed with costs.

The 15th September 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief
Justice.

Administration-duty—Exemption—Court Fees' Act s. 5.

In the goods of
Sreenauth Doss, deceased.

Case submitted to the Chief Justice under Section 5 of the Court Fees' Act, 1870, by Mr. R. Belchambers, Taxing Officer of the High Court.

A suit for a division of a joint estate having terminated in a settlement, the terms of which were embodied in a decree, the receivers who had been appointed *pendente lite* endorsed and transferred certain securities and shares to one of the parties D pursuant to the decree. The Bank of Bengal, Account-Department, and the Companies concerned, having refused to recognize the transfer, D applied for letters of administration in respect of the securities and shares in question, claiming exemption from the duty prescribed by the Court Fees Act, Schedule I, Clause II, on the ground that she ought not to have been required to obtain such letters, her right having been declared by a decree of the High Court:

Held, that the prescribed duty must be paid, and that there was no ground for exemption from it.

Case.—It appears that Sreenauth Doss, Gopeenauth Doss, and Troyluckonauth Doss were brothers, and joint in estate.

Troyluckonauth Doss died, leaving a childless widow, Sreemutty Gooyemoney Dossee, his sole heiress and representative.

Sreenauth Doss died after Troyluckonauth Doss, leaving two widows, Sreemutty Bindobassenee Dossee and Sreemutty Doorgamoney Dossee, his heiresses and representatives in estate, and an infant daughter.

The joint estate consisted of moveable and immoveable property of considerable value, including Government securities, Calcutta Docking Company's shares, Howrah Docking Company's shares, and National Bank shares, all which securities and shares stood in the name of Sreenauth Doss.

In a suit No. 652 of 1869, brought by Gopeenauth Doss against the widows of his deceased brothers for a division of the joint estate, two receivers were appointed *pendente lite* to receive the interests on the dividends on the Government securities and shares standing in the name of Sreenauth Doss.

The suit terminated in a settlement between the parties, the terms of which were embodied in a decree, whereby (*inter alia*) it was declared that Gopeenauth Doss was entitled to four equal twelfth parts or shares of the joint estate (the same into twelve equal parts or shares being considered as divided); that Bindoobassenee Dossee and Doorgamoney Dossee, as the widows, heiresses, and representatives of Sreenauth Doss were entitled each to two equal twelfth parts or shares thereof; and that Gooyemoney Dossee, as the widow, heiress, and representative of Troyluckonauth Doss, deceased, was entitled as and for the estate of a Hindoo widow to the remaining four equal twelfth parts or shares thereof. The decree also directed that the receivers should pay a sum of Rs. 25,000 to Gooyemoney Dossee in full of her claims, as the widow of Troyluckonauth Doss, to a share of the joint estate, and should, after such payment and the payment of certain costs, divide the residue of the monies, Government securities, and shares in their hands into twelve equal parts or shares, and transfer to Gopeenauth Doss four of such shares, being his own shares, and also two out of four other shares, being Sreemutty Gooyemoney Dossee's shares, to Sreemutty Bindoobassenee Dossee two other of such shares to be held and enjoyed by her as a Hindoo widow, and also one out of the remaining two of Gooyemoney Dossee's four shares to be held and enjoyed by her absolutely, and to Sreemutty Doorgamoney Dossee two other of such shares to be held and enjoyed by her as a Hindoo widow; and also the remaining one of Gooyemoney Dossee's four shares to be held and enjoyed by her absolutely.

Pursuant to the decree, the receivers endorsed and transferred to Doorgamoney Dossee the securities and shares set forth in the Schedule B annexed to her petition.

The Secretary to the Bank of Bengal and the Comptroller-General of Accounts having, as regards the Government securities, and the Directors of the Companies issuing the shares, having, as regards the shares, declined to recognize the transfer of the Government securities and shares effected by the endorsement of the receivers, Doorgamoney Dossee has applied for and obtained an order for letters of administration to the estate of Sreenauth Doss, limited to the Government securities and shares allotted to her; and her attorneys on her behalf claim exemption from the payment of administration duty on the ground that she ought not to have been required to obtain letters of administration, her right to the Government securities and shares having been declared by a decree of the High Court, and the Government securities and shares having been actually transferred to her in pursuance of the directions of the decree. Stress is also laid on the fact that the transfer was made by endorsement of the receivers, whose right to receive the interest and dividends had been practically recognized by the payment to them of the interest and dividends during the time that they had authority to act as receivers.

If Doorgamoney Dossee is, without obtaining letters of administration, entitled to be paid the interest and dividends on the Government securities and shares, it is open to her to assert her right by suit, without taking out the letters of administration for which she has obtained an order; but she cannot ask the Court to grant her letters of administration, and at the same time contend that the grant is superfluous, as a reason why she should not be required to comply with the provisions of the Court Fees' Act as to the payment of administration duty.

The liability to pay the duty prescribed by Schedule I Clause II of the Act does not depend upon any question as to whether or not it was necessary to obtain probate or letters of administration, but upon the fact of probate or letters of administration having been obtained in respect to property (not being trust property) of an amount or value exceeding Rs. 1,000.

At the request of the attorneys of Doorgamoney Dossee, the question raised on her behalf is submitted for the final decision of the Hon'ble Chief Justice under Section 5 of the Court Fees' Act, 1870.

Decision of the Chief Justice.

The duty prescribed by the Act must be paid. There is no ground for exemption from it.

The 15th September 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Enhancement of Rent—Notice—Issue as to Holdings—Objection—Waiver.

Case No. 1144 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 4th March 1873, reversing a decision of the Moonsiff of Hureepal, dated the 31st August 1872.

Nidhoo Monee Joginee and others (Defendants) *Appellants,*

versus

Kishen Nath Banerjee and others (Plaintiffs) *Respondents.*

Mr. Ameer Ali for Appellants.

Baboo Bama Churn Banerjee for Respondents.

In a suit for arrears of rent at enhanced rates, where it is found that a single notice has been issued although there are two holdings at two rents, the Court should frame an issue which will allow the plaintiffs and the defendants, if they wish it, to give evidence;—the former, to show that the two holdings are now held at one consolidated rent, and it may be enhanced as of one holding;—and the latter, that he is entitled to have the enhancement made in such a way that he may give up one and retain the other.

Where the defendants in such a case do not take any objection to the notice on the ground that it was single, they cannot on that account be considered to have waived it.

Couch, C.J.—We think we must remand the suit. It was brought to recover arrears of rent at the enhanced rates, but the notice which was served was a single notice claiming one sum as the enhanced rent. It is admitted by the Counsel for the appellants, the defendants, that his clients did not in their written statement object to the form of the notice, and no issue was framed raising the question which is now raised. There appears to be only one issue about the notice,—whether the notice was served on the defendants and on another person who is dead; but the Moonsiff, having the notice in evidence before him, said that it was necessary for the plaintiffs to have issued two notices of enhancement; for the issue of one notice would give the defendants no choice to retain one of the two consolidated holdings

and relinquish the other, if they were so disposed. That was correct, assuming, as the Moonsiff appears to have thought, that there were two holdings at two rents, and that the defendants might be entitled to relinquish one and keep the other. But if this objection had been taken at the settlement of issues, and an issue had been framed to try the validity of it, the plaintiff might have shown that he was entitled to treat the two holdings as one, and that there was in reality but one rent, and there should be but one enhanced rent. When the Moonsiff saw this objection, he ought to have framed an issue so as to have given the plaintiff an opportunity of showing that his notice was correct, and one which he was entitled to serve.

The Judge, when the case came before him in appeal, disposed of it by saying that it was undoubtedly an objection that the defendants might have taken, but that it was open to them to waive it, and by not taking it, it might be presumed that whatever these jummas may have been in their inception, they have subsequently been regarded as consolidated. We do not think he was justified in saying that. He seems also to have put a construction upon the written statement which it does not fairly bear. We do not think that it can be considered that the defendants by not taking the objection waived it, although, if the Moonsiff had not raised it, and no notice had been taken of it by the defendants either in the first Court or in the Appellate Court, we should have held, as we did in a special appeal, No. 963 of 1873,* that it was too late to take it in a special appeal. There we said that the decree ought to be made so as to give the tenants an opportunity of relinquishing one holding and keeping another, and our reason for saying so was that the case was to be tried again by the Lower Courts; and as that was to be done, and the notice, although it included the different holdings, specified the rents formerly paid for each, we pointed out to the Court that when it came to make its decree, it ought to do so in such a way as to secure to the tenant the power of relinquishing one or more of the holdings and keeping the others. But this case is somewhat different. Unless there was a ground for remanding it (which we think there is), the decree which is appealed against would be final.

* *Ante*, p. 404.

We ought, in our opinion, to remand the case in order that the Moonsiff may do now what he should have done before giving his judgment upon this objection, *viz.*, frame an issue applicable to the objection, and allow the plaintiffs and the defendants, if they wish it, to give evidence; the former, to show that the two holdings are now held at one consolidated rent, and it may be enhanced as of one holding; and the latter, that he is entitled to have the enhancement made in such a way that he may give up one and retain the other.

The defendants not having taken the objection, we think that each party ought to pay his own costs of this appeal and of the hearing in the Court below.

The 15th September 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Joint Appeal—Misjoinder—Transfer of Holding—Mutation of Names.

Case No. 54 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 26th September 1872, modifying a decision of the Moonsiff of Urrareah, dated the 28th June 1872.

Motee Roy (Plaintiff) *Appellant,*

versus

Shaikh Meajan and others (Defendants)
Respondents.

Mr. M. L. Sandel for Appellant.

Baboos Doorga Mohun Doss and Kishen Dyal Roy for Respondents.

Plaintiff sued three of his ryots for arrears of rent. Two of the defendants M and G pleaded transfer of their shares of the land to one M A, and the third S M admitted tenancy, but contended for a lower rate of rent than that claimed. M A intervened and filed a written statement. The Moonsiff found that M A had not caused his name to be entered on the plaintiff's serishtah and gave a decree against all three defendants, making M A jointly liable for the costs. Against this decision M, G, and M A appealed, and the Judge relieved the two former from the decree, making the third party pay the whole amount decreed:

HELD, that it was an error to allow the three appellants to appeal together, and that their joint appeal ought to have been treated as two separate appeals.

HELD, that as there had been neither a transfer of the holding in the serishtah of the zemindar, nor anything in the way of acceptance or recognition by the zemindar of M A as his tenant, M and G were not exempted from their responsibility to pay the rent.

Phear, J.—This case exhibits several very anomalous features, although the suit, when first instituted, was truly simple enough.

The plaintiff Moteeram sued three persons, Meajan, Ghogun, and Sheer Mahomed, to recover from them arrears of rent for the years 1277, 1278, and 1279 of certain land which, he said, they cultivated as his ryots. Two of these, Meajan and Ghogun, said by way of defence that they had sold their shares and transferred them to one Mahomed Ali in the name of his wife, Mussamut Kuréemun, the daughter of Meajan. The third defendant, Sheer Mahomed, admitted that he was a tenant, and he also stated that this transfer of Meajan and Ghogun's was a benamee affair. He, however, contended that he and his two brothers held the tenure at a lower rate of rent than that claimed by the plaintiff.

Mahomed Ali in some way, which has not been made clear to us, intervened in this suit, and presented a written statement which was filed.

Upon the trial of the case in the first Court, the Moonsiff after discussing the evidence came to the conclusion that Meajan, Ghogun, and Sheer Mahomed were the old ryots; that Mahomed Ali had not procured his name to be entered in the plaintiff's serishtah; that the plaintiff had never taken any rent from him; and that there was nothing on the facts before him to show that Meajan and Ghogun were exempted from the responsibility of paying the rent to the plaintiff; that the rent payable for the tenure was Rs. 88, and not Rs. 64; and accordingly he gave a decree for that rent against all these three persons, and he also made Mahomed Ali jointly liable with them for the costs of the suit.

Against this decision, Meajan, Ghogun, and Mahomed Ali appealed jointly, that is to say, the two first persons, against whom a decree for payment of the money was made, joined with the third, Mahomed Ali, against whom no decree other than a decree for costs was made, in appealing against the whole of the Moonsiff's decision, and Sheer Mohamed did not appeal.

In the Lower Appellate Court, the Judge came to the conclusion that Meajan and Ghogun's story of the transaction was established, and held that they ought not to be compelled to pay the rent to the plaintiff, but that Mahomed Ali ought to pay the whole rent. And accordingly, upon the appeal presented by these three persons jointly, he gave a decision which relieved

two of them from the decree of the Court below, and made the third of them pay the whole amount decreed, irrespective of the decree which had been made against Sheer Mahomed who had not appealed; and he further made each party bear his own costs.

It is, we think, obvious that this decree is incorrect. The error in the proceeding was produced by allowing Meajan, Ghogun, and Mahomed Ali to appeal together. If, as ought to have been the course taken, their joint appeal had been treated as two separate appeals,—one by Meajan and Ghogun, against whom the Moonsiff had made a decree in the first Court, and the other by Mahomed Ali, against whom the Moonsiff had not made a decree,—the Judge would have seen at once that on the view of the facts which he took he ought to have dismissed the plaintiff's suit against Meajan and Ghogun with costs, and he ought to have dismissed the substance of Mahomed Ali's appeal altogether, because he had nothing to appeal against except the order made upon him to pay costs; and that result would have been altogether different from the result which has been brought about by the decree which the Lower Appellate Court has made. It is plain, therefore, that we must reverse the decision of the Lower Appellate Court.

We think, however, that it is not necessary for us to remand the case for re-trial in that Court. The Judge has, we think, wrongly estimated the evidence which bears upon Meajan and Ghogun's liability to pay the rent. There seems to be no question at all that Mahomed Ali did not get his name entered in the plaintiff's *serishtah*; there seems also to be no doubt at all that the rent was never paid to the plaintiff in Mahomed Ali's own name. There has been therefore neither a transfer of the holding in the *serishtah* of the zemindar, nor has there been anything in the way of acceptance or recognition by the zemindar of Mahomed Ali as his tenant. It seems to us upon this state of the evidence that the first Court was quite right in coming to the conclusion that Meajan and Ghogun were not exempted from their responsibility to pay the rent. The Judge of the Lower Appellate Court not only altered the decision of the first Court in the particulars which have been mentioned, but he also altered the rate of rent. And it seems to us that he has done this upon no sufficient evidence. We understand from the judgment of the Moonsiff that the rate of rent was sworn to by several witnesses; and the papers upon which the Moonsiff relied were

proved by witnesses. The Judge has made no comment whatever upon the testimony of the witnesses: he has apparently disregarded that altogether; and he has put the hushood papers on one side, because in his opinion from their appearance, particularly from the appearance of one of the sheets, the whole of them are a fabrication. It is very rightly observed by the learned pleader who appears for the appellant that a conclusion of this kind is very serious indeed. It amounts to a conviction of the witnesses who have spoken to the authenticity of this document of perjury; and it also, of course, necessarily involves the further fact that this document must have been deliberately forged by some one. The Judge, however, without any other grounds for so concluding except that afforded by his own eyesight, arrived at this very serious conclusion without the smallest misgivings whatever, and we think that he was not justified in so doing. On the whole, it appears to us that we ought not to send back the case for a re-trial, but to reverse the decision of the Lower Appellate Court and affirm that of the first Court with costs in both the Courts.

The 15th September 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Execution—Copy of Judgment of Privy Council.

Case No. 265 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 8th August 1873.

Joy Narain Girde (Judgment-debtor)
Appellant,

versus

Goluck Chunder Mytee (Decree-holder)
Respondent.

Mr. J. T. Woodroffe and Baboos Kalee Mohun Doss and Ram Chunder Mitter
for Appellant.

Baboos Bhowanee Churn Dutt, Mohinee Mohun Roy, and Hem Chunder Banerjee
for Respondent.

A Court in executing a decree in a case which has been appealed to the Privy Council, is not warranted in receiving a mere copy of the printed judgment of the Privy Council as if it were a decree.

Markby, J.—In this case it appears that the application made to the Lower Court for execution was not upon the decree of the first Court for the purpose of executing that

decree, notwithstanding any appeal there might be against it, but upon that decree alleging that it had been affirmed by this Court and also by the Privy Council. It appears also that the records of the original suit and of the appeals to this Court are still in the Privy Council appeal department of this Court, never having been in the hands of the District Judge since the case was originally decided by him. It further appears that the order of Her Majesty in Council has never arrived in this country: at least, no copy has been filed either in the Court below or in this Court. Now the applicant having based his application for execution upon the statement that the appeal had been disposed of in his favor by Her Majesty in Council, he was bound to produce the only proper record of that having been done,—which is the order in Council itself. It would lead to the greatest possible confusion, and very often to injustice, if the Courts here, in executing decrees in cases which had been appealed to the Privy Council, were to receive, as has been received in this case, a mere copy of the printed judgment of the Privy Council as if it were a decree.

Under these circumstances we think we ought not to allow these proceedings to go on. The order of the Judge and the proceedings in execution must therefore be set aside. As, however, this objection was not taken in appeal, but appeared on the proceedings in the course of the argument, we think that each party should pay his own costs of this appeal.

The 15th September 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Procedure—Act VIII (B.C.) of 1869 s. 101.

Case No. 130 of 1873.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 8th February 1873, affirming an order of the Moonsiff of Bissenpore, dated the 11th January 1873.

Prem Chand Laha and others (some of the
Defendants) *Appellants,*

versus

Addito Doss (Plaintiff) *Respondent.*

Baboo Tarucknath Dutt for Appellants.

Baboo Rash Beharee Ghose for Respondent.

When proceedings are taken before a Moonsiff under Act VIII (B.C.) of 1869 s. 101, he is bound first to enquire whether an offence has been committed, and if he is satisfied that it has, the only order he can make against the offenders (not being tenants) is that they shall pay the value of the crops distrained.

Markby, J.—It appears that in this case a question having arisen as to the taking away of certain crops which had been attached by the landlord, criminal proceedings were taken by a person named Ram Huree Doss, in whose charge the crops attached were, against Prem Chand Laha and others, for taking away those crops while in his charge. That criminal charge was dismissed and characterized as frivolous on the 19th December 1872. Then, eighteen days after that, proceedings were commenced by the landlord against the said Prem Chand Laha, together with other persons including the persons whom the landlord alleged to be his tenants under Section 101 of Act VIII of 1869 (B.C.) But instead of trying the questions which were to be tried under that Section, the Moonsiff really only tried the question as to who was entitled to the rent, and upon that made an order that the plaintiff should recover the amount claimed from all the parties both the tenants and those who were accused of carrying away the crops; and the Moonsiff also ordered that the parties other than the tenants should pay a fine of 10 rupees each; or in default, be imprisoned for a fortnight. This is entirely a misconception of the proceedings intended by Section 101, and whether an appeal lies or not we think we ought to set that order aside. The Moonsiff was bound first to enquire whether an offence has been committed, and if he was satisfied that an offence had been committed, the only order he could make against the persons (other than the alleged tenants) who are now appellants before us, is that they should pay the value of the crops distrained, as to which there appears to have been no enquiry whatever. In fact, the whole proceedings under that Section have been entirely misconceived.

The result is that the judgments of both the Lower Courts will be set aside. The appellants are entitled to their costs in this Court and the Courts below.

We think we ought to add that we considered it very doubtful whether a proceeding under Section 101 ought to be entertained after a charge in the criminal Court has been made and dismissed.

The 15th September 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Conveyance—Constructive Transfer—Champerly—Contracts contrary to public Policy—Right of Suit.

Case No. 262 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 10th August 1871.

Tara Soonduree Chowdhraia (Plaintiff)
Appellant,

versus

The Court of Wards, on behalf of Shama Soonduree, minor, and another (Defendants)
Respondents.

Baboo Nullit Chunder Sen for Appellant.

The Officiating Advocate-General and Baboo Unnoda Pershad Banerjee for Respondents.

R, the owner of certain property, having died, and his immediate heirs having subsequently demised without leaving issue, N, as the next-of-kin, attempted to take possession, and, being opposed, brought a suit under Act XIX of 1841; but afterwards alienated a moiety of his right title and interest in the property to one K in order to meet the expenses which would be incurred for its recovery. This was done by an *ekrar*, wherein, in consideration of Rs. 50 received in cash, and the trouble and assistance of managing and conducting the necessary law suit and defraying the expenses thereof, N relinquished to K an 8 annas' share, valued at Rs. 75,000. K took proper steps and defrayed the expenses; but the suit was dismissed. K subsequently sold the interest which he had thus acquired, including *wassilat*, to T in consideration of Rs. 1,700 advanced by the latter and expended in the proceedings, valuing the interest thus sold at Rs. 2,18,000. The purchaser then brought a suit against the person in possession, claiming a half share of the property adversely to N, making N a defendant, and praying for a declaration of N's right of inheritance:

Held, that the *ekrar* did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit; and that even if plaintiff were entitled to complain of breach of contract by N, she could not recover against the principal defendant, the person in possession, who was no party to the deed.

Held too, that the suit could not be maintained by reason of the nature of the transaction on which it was based, which was void as being contrary to public policy, and therefore not giving plaintiff any right to sue for the property professed to be passed.

Couch, C.J.—THIS suit was brought for obtaining possession of the realties and personalities specified at the end of the plaint, and failing delivery of the latter, their value,

together with mesne profits of the half share of the realties, as well as the *wassilat* thereof from the date of suit to the date of recovery of possession, by declaration of the right of inheritance of the second defendant, Nundo Mohun Chowdhry, to the property claimed; and it was valued at Rs. 4,20,813.

The case in the plaint was that Kertee Chunder Chowdhry, the owner of the 2 annas and 15 gundahs' share in Pergunnah Sharepore; and the great-grandson of Joy Narain Chowdhry, the uterine brother of the grand-father of Nundo Mohun, died leaving two minor sons, Juggut Chundra and Bhoobun Chundra Chowdhry, and a widow, Annund Moyee Chowdhraia; and that the eldest son, Juggut Chundra, subsequently died unmarried, and after him, the younger son, Bhoobun Chundra, also died without children, leaving a widow, Huro Muni, who afterwards died before her mother-in-law, Annund Moyee; that upon the death of Annund Moyee, the defendant Nundo Mohun, as the nearest-of-kin, attempted to take possession of the properties claimed, and was opposed in doing so; that thereupon Nundo Mohun brought a suit to obtain possession under Act XIX of 1841; but he subsequently alienated a moiety of his right title and interest in the property to one Kashi Chundra Bhuttacharjee, to enable him to meet the expenses which would be incurred for the recovery of the said properties; that the said Bhuttacharjee took proper steps and defrayed the expenses for the recovery of the properties, but the Judge disallowed the claim, which was preferred under Act XIX, on the 2nd of July 1868; and that Kashi Chundra Bhuttacharjee on the 8th of Chyett 1276 (the 20th of March 1870) transferred his entire right title and interest in the half share to the plaintiff under a *kobalah* or deed of sale for Rs. 1,700 advanced by the plaintiff to meet the expenses. And the plaintiff claimed as having by purchase become the owner of the half share for which the suit was brought. The plaint, after stating that application had been made to the defendant Nundo Mohun requesting him to join in the suit, alleged that he would not do so, and had therefore been made a defendant.

There is a decision of the Judicial Committee of the Privy Council, which is in point, as to whether this suit can be maintained. It is reported in XI Bengal Law Reports, Privy Council Cases, page 36.*

In that case, one Ram Narain Dutt died leaving a talook, and the respondent Jogessur Ghose claimed it as his heir, and the other respondent claimed under a deed of gift from Ram Narain, which Jogessur impeached as a forgery. Whilst these disputes were going on, Jogessur applied to the appellant, Ranees Bhudo Soonduree Dassia, and asked her to assist him in litigating with the other respondent for the purpose of getting possession of all the property which belonged to his maternal grand-father; and it was arranged that in the event of such litigation arising, she should advance the expenses to the extent of Rs. 3,000, and should protect Jogessur from a then pending execution; the consideration being a moiety of the property claimed. Accordingly, an agreement in writing was executed by Jogessur in favor of the appellant, which is set out in the report of the case, by which Jogessur is stated to have received Rs. 3,000 in cash, and in consideration of that to sell the half share to the appellant and to execute that deed of sale; and it is stated that the amount was deposited with Dwarkanath Lahory, mookhtar, the agent on behalf of the appellant, and that all the expenses of the suit for dispossession, and his lodging expenses, were to be defrayed out of that sum. Nothing more was done under the agreement, and no money passed; and Ooma Churn Sircar having taken out execution against Jogessur, Jogessur applied to the appellant's mookhtar to deposit the money; but this was not done, and thereupon Jogessur, instead of instituting proceedings against Eshur Chunder, the other respondent, agreed to an amicable partition, which was embodied in a document dated the 9th of January 1867, satisfied Ooma Churn's decree, and saved his estate. On the 20th of September 1867, the appellant commenced the suit by filing a plaint against the respondents, that is, Eshur Chunder Dutt and Jogessur, and against persons holding as lessees under them, seeking to have the deed of sale declared a forgery, and all the proceedings taken under it since his death declared to be fraudulent, and claiming possession of half the property under the deed executed by Jogessur, together with mesne profits.

The case was precisely like the one before us, the plaintiff, the alleged purchaser, bringing a suit against the person who was in possession of the property, and claiming it adversely to the person who had sold to him, and making, as is done here, that person also a defendant. The nature of the suit was

the same; and on the 20th of July 1868, the Subordinate Judge dismissed the plaintiff's case on the ground that she could not sue alone. There was an appeal from that decision to this Court, and it was held that the suit was rightly dismissed, but not on the ground which was taken by the Subordinate Judge. The two learned Judges, Mr. Justice Loch and Mr. Justice Mitter, considered that the plaintiff had not fulfilled her part of the contract, as the consideration had not been paid; and that under the ruling of the Privy Council, in the case of *Rajah Saheb Perhlad Sein*, XII Moore's Indian Appeals, page 301,* the action must fail.

The plaintiff appealed to Her Majesty in Council, and the Judicial Committee in their judgment said:—"This suit was based upon a deed executed by Jogessur Ghose, in favor of the plaintiff, in August 1866. The effect of that deed, as far as it is material, may be thus stated:—It recites that Jogessur Ghose was entitled to certain properties from his maternal grandmother; that he had been dispossessed of the whole of those properties; and thus stated as I have done already. Then having noticed the dismissal of the suit by the Subordinate Judge, and the decision of the High Court upon that, their Lordships proceed to say:—"The principal question is the effect of the first deed, whether it operated as a present transfer of the property, or only as an agreement to transfer it upon certain contingencies which did not happen. In support of the latter contention, the case was referred to of *Rajah Saheb Perhlad Sein v. Baboo Budhoo Singh*. Without referring at length to that case, the circumstances of which are in many respects similar to those of the present, it may be enough to quote a passage wherein their Lordships say:—"The Court below seem to have ruled that the effect of the execution of a bill of sale by a Hindoo vendor is, to use the phraseology of English law, to pass an estate irrespective of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the statute of uses. Whether such a conclusion would be warranted in any case is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review (which are there referred to), in both of which actual possession seems to have passed from the vendor

* 12 W. R., P. C., 6.

“to the purchaser. To support it, the execution of the bill of sale must be treated “as a constructive transfer of possession. “But how can there be any such transfer, “actual or constructive, upon a contract “under which the vendor sells that of “which he has not possession, and to which “he may never establish a title. The bill “of sale in such a case can only be evidence “of a contract to be performed *in futuro*, “and upon the happening of a contingency “of which the purchaser may claim a “specific performance, if he comes into “Court showing that he has himself done “all that he was bound to do. Having “regard to this case, and to the provisions “which have been referred to of the deed, “their Lordships are of opinion that it did “not operate as a present transfer of the “property, but as an agreement to transfer “so much of it as might be recovered in a “suit to be instituted to which both Jogessur “Ghose and the plaintiff were to be parties.”

In this case it is true that, as far as appears, the consideration was paid; but that makes no difference in this part of their Lordships' decision that an instrument of this kind does not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be thereafter instituted.

Then they proceed:—“This construction of “the deed disposes of the case; for, even if the “plaintiff be entitled to complain of breach “of contract by Jogessur, she cannot recover “under it possession of the property against “Jogessur; *a fortiori*, she cannot recover “against Eshur Chunder Dutt, who was no “party to the deed.” Here also the principal defendant, the person from whom possession of the property is sought to be recovered, Shama Soonduree, or those under whom she claimed, were no parties to the deed. This case, therefore, is an express authority that the present suit cannot be maintained.

But we think there is another ground upon which we should hold that the suit cannot be maintained; and it is desirable that the Court should express its opinion upon that part of the case also.

The instruments upon which the plaintiff's right to sue for possession of the property is said to be founded, are set out in the paper-book. The first is at page 83. It is an ekrar, executed by Nundo Mohun Chowdhry to Kashi Chundra Bhattacharjee; and after reciting the circumstances under which it was alleged that Nundo Mohun had a claim to the property, it is stated that he had appeared

in the Court of the Judge and filed a petition under Act XIX of 1841; and that the moveable and immoveable property, so far as he could ascertain by enquiry and investigation, were of the value of Rupees 1,71,325. That is what he valued his claim at; and then he says that he had made an agreement with Kashi Chundra Bhattacharjee for taking Rs. 50 in cash, and having the expense of the suit defrayed, and Kashi Chundra looking to the proper management of it, and in consideration of Rs. 50, which, he says, he had received in full, and the trouble and assistance and the managing and conducting the case, and defraying the expenses thereof by Kashi Chundra, he relinquished his right to an 8 annas' share of the properties, which it is said are valued in all to the amount of Rs. 75,000, thus parting with property of this value for only Rs. 50, and such portion of the expenses of recovering the entire property as would fall upon the remaining half share which he kept.

This was about the time of the proceedings under Act XIX of 1841. The ekrar is dated the 1st of June 1868, and the plaint says that the claim under that Act was disallowed on the 2nd of July 1869. What was done in the interval between that and the making of the deed of sale to the plaintiff, does not clearly appear; but on the 20th of March 1870, Kashi Chundra Bhattacharjee sold to the plaintiff the interest which he had acquired by the previous deed. There is a kotalah of that date in which, after reciting the ekrar to him from Nundo Mohun, and that he had expended money in the proceedings to the amount of Rs. 1,700, he, Kashi Chundra, in consideration of the Rs. 1,700 which it is alleged he had expended, sold all his rights and interests in the moveable and immoveable property, as well as the wassilat of the immoveable property, to the plaintiff. And there is at the end of the kotalah a very significant statement. We have seen that in 1868, when the first instrument was executed, the half share was valued at Rs. 75,000; here it is said by Kashi Chundra that, “having estimated the value of my aforesaid properties according to the current market-value at the amount of Rs. 218,000, I have got this conveyance engrossed on a stamp of Rs. 1,000.”

Thus we have, according to the statement of the parties, this property to which there was a claim, not property in the possession of the seller in any way, valued at Rs. 218,000, and sold to the plaintiff for Rs. 1,700. The plaintiff has to bear the costs of any

litigation in endeavours to recover the property, and Nundo Mohun, the person who is said to be entitled to it, practically parted with the half share of this estimated value for Rs. 50. No doubt he gets a suit brought, of which he would have the benefit so far as it related to the other half share which he retained.

That is the nature of the transaction. It appears to us to be one which this Court must hold to be void, as being contrary to public policy, and as therefore not giving the plaintiff any right to sue for the property which was professed to be passed by these instruments.

In *Fischer v. Kamala Naicker** (VIII Moore's Indian Appeals, page 170), the Judicial Committee said that, in order to make the agreement or contract void, it must have something of the qualities which are attributed to champerty or maintenance by English law; it must be something against good policy and justice; something tending to promote unnecessary litigation; something which in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary; and that the substance of the transaction is to be looked at, and not merely the language of the instrument. Looking at the substance of this transaction, it appears to us to come within these terms, as being against good policy and justice, and as tending to promote unnecessary litigation, and being in a legal sense immoral. Their Lordships speak of the qualities which are attributed to champerty or maintenance by the English law; and for the common law of England upon this matter, we refer to the 1st Volume of Hawkins' Pleas of the Crown, page 470, where it is said—"It seemeth to be a high offence at common law to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under-rate; and it seemeth not material whether the title so sold be a good or a bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested. For all practices of this kind are by all means to be discountenanced as manifestly tending to oppression, by giving opportunities to great men to purchase the disputed titles of others to the great grievance of the adverse parties,

"who may often be unable or discouraged to defend their titles against such powerful persons which, perhaps, they may successfully enough maintain against their proper adversaries."

To what is there said as a reason in England, we think we may add what is forcibly and truly expressed by Mr. Justice Holloway in VII Madras High Court Reports, page 146. There the learned Judge says:—"In this country it may be added that this is now the favourite instrument for revenging private quarrels. A suit against a man's enemy is commenced in the name of another, promoted by the money of the enemy, and sustained by the perjury which he suborns. The state of Hindoo society, with joint families, dissatisfied junior members, adoptions real or fictitious, afford a fine field for the operations of these speculators in litigation. At the elbow of every man with a grievance, real or imaginary, is one of these unclean animals busily engaged in fanning into a law-suit every trifling difference. Where a zemindaree is concerned, the operations are on a larger scale. The claimant is taken up either by an individual speculator or a joint-stock company. Having nothing, he is prepared to promise everything, and agreements stipulating for enormous sums of money are executed in favor of these people. The suit is promoted with their money, and the victory leaves the victor and the vanquished together prostrate at the feet of these unholy speculators. The nominal plaintiff is not the poor man of Lord Abinger, but the poor neighbour of Quirk, Gammon, and Snap. Let a man with the smallest knowledge of this country cast his eyes upon the wide-spread ruin and immorality created by these proceedings, he will scarcely doubt that it is contrary to public policy, if the welfare of a country is any element therein, to permit these creatures to bargain for the proceeds of the litigation which they have commenced, fomented, and carried on without the smallest interest other than the nefarious bargain in the suit which they are conducting. On that portion of public policy which consists in the purity of the administration of justice, the effect is still more directly pernicious.

"The unlimited supply of evidence to support any claim, true or fictitious, renders it easy for these speculators to produce, for the support of any claim, with equal ease, whether it is true or false, a

* 3 W. R., P. C., 33.

"body" of people called skilled witnesses "whom by any mode of cross-examination, directed merely to inconsistencies in the story, which they came to tell, it is impossible to break down."

We think these observations are applicable to the present case, and that the transaction upon which the plaintiff founds her right to bring the present suit, is one to which effect ought not to be given by the Courts in this country.

But there is still another objection to the suit being maintained, which we may as well notice.

Supposing that Nundo Mohun was properly adopted, it appears in the evidence that there is a person who is nearer in title as heir than Nundo Mohun,—that is, Ram Dyal Sen.

It was admitted that if Ram Dyal bore the relationship which the defendant's witnesses said he did, he would be preferable to Nundo Mohun; and we think the evidence which was given shows that he was related as alleged by the defendant. The Subordinate Judge has not thought it necessary to give a decision upon that question.

It is right to say, and we think it is what his decision would have been if he had given a formal decision upon it, that the defendant's evidence on this part of the case is not met by the evidence which the plaintiff gave. There is evidence, which appears to be trustworthy, that Ram Dyal was treated by the members of the family as related in the way which it is said on the part of the defendants he was. It is not necessary to examine that evidence in detail. This also would be a bar to the plaintiff recovering the property which she claims. The Subordinate Judge has decided against the plaintiff on the ground that the deed of permission to Bhobun Chundra to adopt was not proved. He says, it did not appear that there was any such deed of permission, and consequently the adoption of Nundo Mohun would not give him a title to recover the property, assuming that he was right in the other part of his case.

We think it is doubtful whether this decision is right. The deed of adoption is said to have been executed so long ago as 80 years. The copy of the deed was produced. The witnesses to it were dead, and the Subordinate Judge says of it that in the copy, which was produced before him, the names only of five persons of low position in life have been put in the deed in the place of the subscribing witnesses. He then

says that no attempt appears to have been made to establish the authenticity of the deed. We cannot expect it at this distance of time. And he considered that the conduct of the family in not disputing the adoption would not be evidence against Nundo Mohun. We think he was wrong there; for, it appearing that the adoption had, for a very long time, 40 or 50 years, been acted upon and acquiesced in by the parties interested in opposing it, by the members of the family, whose rights had been set aside by the adoption, and who had not apparently made any opposition to it, we think it should be presumed that the deed, of which a copy was produced, and which had been filed many years before, was a genuine one; and the Subordinate Judge was not justified in setting it aside upon suspicion on account of the apparent character or position of the attesting witnesses. From the lapse of time, it was impossible to clear up any doubt of that kind. We only mention this in order that it may not be supposed that in dismissing the appeal and confirming the decision of the Lower Court we have adopted the reasons of that Court.

We think the plaintiff has no right to recover possession of the half share, and that the decree of the Lower Court dismissing the suit ought to be confirmed with costs.

The 31st July 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock, and Sir Montague E. Smith.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Review of Judgment—Act VIII of 1859 s. 7.

Ramlhurry Mondul

versus

Mothoor Mohun Mondul.

A mere refusal to grant a review of judgment cannot alter the judgment sought to be reviewed or the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree.

A former suit for a share of property purchased in the name of G, which claimed it to be joint property, does not bar the plaintiff from suing for other property.

* From the judgment of Bayley and Pundit, JJ., in Regular Appeal No. 869 of 1865, decided 29th March 1866,—5 W. R., Civil, 182.

which was bought in the name of M at another time, the latter claim being no part of the claim arising out of the cause of action in respect of the property first mentioned so as to come within the meaning of Act VIII of 1859 s. 7.

THE appellants in this case are Ramhurry Mondul for self and as guardian of Judoonath Mondul and Bhurroonohur Mondul, and Ramgopaul Mondul, and the respondent is Mothoor Mohun Mondul, who was the plaintiff in the suit. The plaintiff obtained a decree of the High Court, and the appellants object to it.

The suit was commenced on the 8th July 1865 by Mothoor Mohun Mondul, claiming in his own right and as heir of the late Bulloram Mondul. It was brought against Khamankaree Dossee, the widow of the late Mokoondram Mondul, Ramhurry Mondul, Ramdoolal Mondul, and Ramgopaul Mondul, to recover possession of a twelve annas share of certain talooks mentioned in the schedule to the plaint.

The suit was founded upon a decree passed by the High Court on the 29th September 1863 in two suits: one, in which Bulloram sued the appellants and the respondent; and the other, in which the appellants sued Bulloram and Mothoor Mohun, the plaintiff in this suit. Bulloram's suit was brought on the 22nd March 1861, and in that suit he sought to recover possession of an eight annas share of certain talooks, which were mentioned in the schedule to his plaint. He stated that his father, the late Nityanund Mondul, had two sons, of whom the late Gridhur Mondul was the eldest, and he the second; that they were two brothers, and lived ijmallee; that they had joint possession of the property left by their father, and with the proceeds of a joint trade in salt, &c., acquired the following talooks and putnee in the name of the eldest brother (see Record, p. 27). That suit was brought merely for an eight annas share of property which had been purchased in the name of Gridhur Mondul, and for an eight annas share of Boicheeram Chuck, standing in the name of Mokoondram.

With reference to the suit brought by the appellants, we have not the plaint before us, but the substance of it is stated in the judgment at page 32, line 20. It is there said:—"In suit No. 18 of 1861, Ramhurry, Ramdoolal and Rangopaul" (Ramdoolal is now dead) "sought to recover an eight annas share in Chucks Gourang, Gohurdhunpore, Bahoolbalpore, Boicheeram Chuck, and other property, which it is not now neces-

sary to mention, on the ground that this property had been acquired by Gridhur and Mothoor Mohun when those two were in ijmallee occupation, independent of Bulloram, who was a mere pensioner."

That suit included three of the mehals which are now the subject of the present suit and were not included in Bulloram's suit. The suit of Bulloram included only one of the mehals, which is the subject of the present suit, but it is to be observed that in the present suit the plaintiff is suing not for a twelve annas share of the mehal which was included in Bulloram's suit, but merely for a four annas share of that mehal, admitting that the eight annas share belonging to Bulloram is now in his, the plaintiff's, possession. With regard to Mehal Boicheeram Chuck, which was one of the mehals mentioned in Bulloram's suit, he says:—"Towjee No. 491, in the name of the late Mokoondram Mondul, sudder jumma is Rs. 2,077 odd annas, of which, deducting eight annas share in possession, the remaining sudder jumma of the four annas in my own right is Rs. 519." So he is not suing to recover any portion of the eight annas share of that mehal which was recovered in Bulloram's suit. Nor is he now asking to have execution with regard to any portion of that share.

The two suits were heard together by Mr. Justice Elphinstone Jackson, who gave judgment, which is set out at page 6 of the Record. He considered that the property was joint property belonging to Bulloram and Gridhur Mondul, but that the parties were bound by an award, by which only a four annas share had been awarded to Bulloram. He says:—"I therefore decree that arbitration award to be binding upon all parties, and Bulloram, Ramhurry, and his brothers, and Mothoor Mohun Mondul, to be entitled to a four annas, six annas, and six annas share respectively."

An appeal was preferred against that decision. Khamankaree Dossee, who was the widow of Mokoondram, also appealed upon the ground that it had been held that the property standing in the name of Mokoondram was joint family property. She contended that it was the separate property of Mokoondram. The case then went up to the High Court, and the judgment, which is set out at page 20 of the Record, was given by a Division Bench. They considered that the parties were not bound by the award, and they held that Bulloram was entitled to his full legal share of the joint undivided

family property, namely, one-half; and then as regards the appeal of Khamankaree, the widow of Mokoondram, they say:—"We have carefully considered all the arguments adduced by the Counsel, Mr. Paul, but we find nothing to induce us to interfere with the decision of the Judge to the effect that Mokoondram's acquisitions were obtained with family funds, and were for the family at large, and not for himself individually. This being the case, and the property having been acquired while Mokoondram was living in commensality with the rest of the family, and on default of proving separate means sufficient to give separate acquisitions, it is legally to be presumed that the property standing in his name was acquired for and belonged to the family in general. We, therefore, decree the appeal of Mussamut Gourmoney Dossee, the widow of Bulloram, and, in modification of the decision of the Judge, award her one-half or eight-anna share of the family property. The appeals of Ramhurry and his brother, and of Mussamut Khamankaree, are dismissed with costs." Upon that a decree was drawn up in Bulloram's suit in favor of the widow of Bulloram, by which it was awarded that the decision of the Lower Court should be modified to the extent of awarding to the special appellant Gourmoney Dossee one-half or an eight annas share of the property which was the subject of that suit.

It was contended in argument that this suit is brought for the purpose of executing that decree; but the suit in which it was made did not include any of the property which is the subject of the present suit, except the Mehal Boicheeram, in respect of which the plaintiff is now suing only for the four annas share which belongs to him in his own right, and not for the eight annas share which descended to him as the heir of Bulloram.

Upon a motion for a review of judgment, Mr. Justice Bayley, upon refusing to admit the review, makes use of this expression, speaking of the shares in the three mehals which were not included in Bulloram's suit:—"Because Gourmoney did not sue for these shares, she cannot have them in this suit;" but then unfortunately, the learned Judge went on to say:—"Then they would go half and half to the plaintiff Ramhurry and to Mothoor Mohun and his representatives" (Record, p. 30). At page 24, it appears that the case was again brought before Mr. Justice Bayley on an application for a review of that judgment. He there says, speaking of him-

self and Mr. Justice Roberts, who had joined in the original judgment:—"We have both broadly held that as the title to the three villages was based solely on the allegation of self-acquisition, and that as we held that the whole property was one of a joint undivided character, we ruled that the admission by Bulloram of his not claiming those three villages would not render the title of self-acquisition good. We consequently decided that, as Bulloram did not sue for those villages, they must merge in the general joint property as joint, and so go with the other joint shares, but could in no way be admitted to be what they were claimed to be, self-acquired."

Now it is contended that the effect of the decisions in the two former suits is sufficient to bar the plaintiff under Section 2 of the Code of Civil Procedure from recovering more than an eight annas share of the mehals which are the subject of the present suit, inasmuch as it is contended that it was decided therein that the sons of Bacharam were entitled to an eight annas share, whereas if they were entitled to an eight annas share, the plaintiff in this suit could be entitled only to an eight annas share, and not a twelve annas share.

It appears to their Lordships that what was said by the learned Judge on the two occasions when a review was applied for and refused, was not a decision to that effect, nor an alteration of the judgment which had already been given. A mere refusal to grant a review of judgment cannot alter the judgment sought to be reviewed or the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree.

Their Lordships are therefore of opinion that there is no valid decision as between the parties; that the appellants Ramhurry and others and Mothoor Mohun were each entitled to an eight-anna share of the property. The decision really was that the property was joint family property, of which Bulloram was entitled to an eight-anna share, and the appellants and respondents each to a four-anna share; and there was no decision in the former suit which would bar the plaintiff, under Section 2 of the Code of Civil Procedure, from claiming in this suit the eight annas share which descended to him from Bulloram.

That disposes of the second plea in this suit, which is set out at page 5, that "a moiety of the property standing in the

"name of the late Mokoondram, included in the claim in the suit brought by us, and not included in the claim of Bulloram, was declared by the High Court to belong to the plaintiff, and the other moiety to us. Against the same the plaintiff has again instituted this suit. Such a suit cannot be entertained under Section 2 of Act 8 VIII, 1859."

The other defence was the defence set up by the first plea. The defendants say that as Bulloram did not include in the former suit a claim to recover a share of the mouzahs which are the subject of the present suit, the plaintiff, as his heir, is barred by reason of Section 7 of the Code of Civil Procedure. That Section provides that "every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court."

Now Bulloram was suing in respect of property purchased in the name of Gridhur Mondul, which he claimed to be joint property in respect of which he was entitled to a share. But the present suit has to do with other property, which was bought in the name of Mokoondram at another time, and it appears to their Lordships that those are not the same cause of action, and that the present claim to property purchased in the name of Mokoondram is no part of the claim arising out of the cause of action in respect of other property purchased in the name of Gridhur.

Their Lordships are therefore of opinion that the plaintiff is not barred by Section 7 from recovering Bulloram's share in the mouzahs which are the subject of the present suit, upon the ground that Bulloram omitted to include them in the suit which he brought in respect of property purchased in the name of Gridhur Mondul.

With regard to the case cited from 11 Moore's Indian Appeals, *Ruzloor Ruheem v. Shumsoonees Begum*,* their Lordships are of opinion that it is not applicable to the present case.

In that case their Lordships held that, on their construction of Section 7 Act VIII of 1859, the correct test is whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit; and secondly, that the Section included accidental error and involuntary omission of the subject of the new suit; that is to say, that if the matter

was omitted to be brought in the former suit through error or mistake, that would not prevent the operation of the Section. There was one conversion by the husband of several Government securities belonging to his wife. It was one entire conversion and one cause of action, and not a separate cause of action in respect of each of the Government securities.

It appears to their Lordships that that case is not applicable to the present, and that the cause of action in the present case is not part of the cause of action in respect of which Bulloram was suing.

The third answer was that "in the answer filed in the previous suit brought by us, and in the plaint in this case, the plaintiff has admitted the talooks standing in the name of our father to be his self-acquired property, and he must now be held as bound by his former admission."

There is nothing in that objection. Indeed, their Lordships understood that Mr. Doyne did not press it, and that the property was admitted to be joint family property.

Their Lordships are of opinion that the decision of the High Court was correct, and they will humbly recommend Her Majesty to affirm that decision, and to dismiss this appeal, with costs.

The 15th September 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Minors—Suit by Manager—Act IV (B.C.) of 1870—Jurisdiction.

Case No. 232 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 28th June 1872.

Joyram Lall Mahtoon and others (Defendants) *Appellants*,

versus

W. Stewart (Plaintiff) *Respondent.*

Messrs. J. T. Woodroffe and C. Gregory and Baboo Chunder Madhub Ghose for Appellants.

* 8 W. R., P. C., 5.

The Officiating Advocate-General and Baboo Unnoda Pershad Banerjee for Respondent.

A suit brought by minors through the manager of their property as next friend, must follow the form prescribed by Act IV (B.C.) of 1870. Where the plaintiff on the face of it is one in which the manager himself is plaintiff, and which seeks to set aside deeds constituting a mortgage transaction, the Court cannot turn the suit into a redemption suit on the part of the minors.

Phear, J.—In this suit Mr. William Stewart, the plaintiff, describing himself as manager of the estate of Baboo Jamna Pershad Sookul, Baboo Motee Pershad Sookul, Baboo Kanhaya Pershad Sookul, Baboo Sheo Pershad Sookul, minor sons of the late Baboo Goor Pershad Sookul, under the Court of Wards, asks the Court to set aside two deeds dated respectively 1st and 5th November 1866, and constituting, as he says, an encumbrance upon the minors' property, on the ground that Mussumat Nundho Sooklaen, who made them during the time when she had the same property for the estate of a Hindoo widow, had no power to create such an encumbrance; and also on the ground that she was induced to make them by fraud or by undue and improper influence.

It is at the outset objected that the plaintiff does not disclose any right on the part of Mr. Stewart to sue on this cause of action, and that inasmuch as the provisions of Section 59 of Act IV of 1870 (B. C.) have not been complied with, the suit cannot be treated as a suit brought by the Wards themselves.

We find that this objection to the form and sufficiency of the plaintiff was not made in the Court below, which alone could deal with it fully and fairly as between the parties. And we do not think it right at this stage to decide the case without reference to its merits. We will, therefore, for the moment, pass the objection by and proceed to consider the facts; and, fortunately for us, these are not complicated and not difficult to ascertain: indeed those which are material, and upon which the fate of the suit must turn, are not seriously disputed by either side.

* * * * *

We are, therefore, on the whole, of opinion that the plaintiff has failed to make out his case, and that the suit ought to be dismissed with costs.

During the hearing of this appeal, we were at one time asked to treat the suit as if it had been brought in a different shape from that which it actually bears. The plaintiff is, beyond question, very unfortunately drawn. We suppose that this suit was intended to be a suit brought by the minors through the manager of their property as next friend; and there is an enactment, Act IV of 1870 (B. C.), which prescribes strictly a form which should be followed in such a case. That form has in this instance been totally disregarded, and it is very doubtful how far this Court has the power in view of the enactment just mentioned to alter the plaintiff and give it the shape which it ought to have had, if the minors were to be the plaintiffs. As the plaintiff at present stands, it is on the face of it a plaintiff in which Mr. Stewart himself is plaintiff. If it had shown a cause of action accruing to himself, there is no reason why he should not have personally succeeded upon it. It would therefore be taking a rather long step to change this into an entirely different plaintiff, brought by the minors themselves in the form which is prescribed by the Legislature. The transaction which is represented by the two deeds of November and January, is unquestionably a mortgage transaction; and it is so described in the plaintiff. The minors still have, if they come into Court in the proper way, a right to redeem that mortgage, should they be advised to take that step. And we think that no good reason has been shown why we should so alter this plaintiff as to turn the suit into a redemption suit on the part of the minors, and to give them a remedy which has not been asked for even alternatively by the terms of this plaintiff. The language in which the plaintiff is couched is also of such a kind as seems to us not very worthy of the department of public administration which is supposed to have the management of this suit. If this really is a suit instituted by a public officer on behalf and in the interests of the minors, it is greatly to be regretted that such language should have been indulged in as we find in the pages of this plaintiff.

For all these reasons, we are of opinion that we ought not to interfere in any way to reform the present suit, and that our decision must be limited to directing that the suit be dismissed, and that the plaintiff, Mr. Stewart, do pay the defendants their costs in both the Courts.

The 16th September 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

*Act X of 1859 s. 23 cl. 6—Act VIII (B.C.)
of 1869 s. 27—Collector's Jurisdiction—
Ejectment.*

Case No. 1770 of 1872.

*Special Appeal from a decision passed by
the Subordinate Judge of Mymensingh,
dated the 20th August 1872, affirming a
decision of the Moonsiff of that district,
dated the 23rd December 1870.*

Gunga Gobind Roy and another (Defendants)
Appellants,
versus

Kala Chand Surma Gangooly and others
(Plaintiffs) *Respondents.*

Baboo Nullit Chunder Sen for Appellants.

Baboo Rash Beharee Ghose for Respondents.

Under Act X of 1859 Section 23 Clause 6, the Collector's Court is one of limited jurisdiction, and has no power to determine a question of right to the land larger than the bare *right to possession*. Where a zemindar pursues his right to eject in a manner that is not legal, possession will be restored, although if the zemindar had proceeded legally, he could have ejected his ryot: such cases are contemplated by the above Section and Act VIII (B.C.), 1869 Section 27.

Kemp, J.—THREE grounds are taken in this special appeal: 1st,—that the suit of the plaintiff is barred under Section 27 Act VIII of 1869 (B.C.), inasmuch as the suit was not commenced within the period of one year from the date on which the cause of action accrued; 2nd,—that the plaintiff having failed in the suit which he brought in the Collector's Court under Clause 6, Section 23, Act X of 1859, his present suit on the same cause of action is barred; 3rd,—that the puttee, the subject-matter of this suit, is not a subsisting tenure, as the Government have cancelled it and determined it.

The plaintiff sued to have his right declared, setting forth his title, and for recovery of possession. The suit was brought in Jeyt 1277. It was alleged that he was dispossessed by the zemindar, special appellant, in Assin 1270.

Both Courts have decreed the plaintiff's suit. With reference to the first ground of special appeal, we observe that the limitation point was only taken in a very general

way in the Court below; the defendant did not state that the suit was barred under Section 27, Act VIII of 1869; and even if he had done so, we do not think that that argument would have been in any way tenable, as this suit is not brought under that Section at all. It was originally brought as an ejectment suit under Clause 6, Section 23, Act X of 1859; and as far as the record enables us to judge, it was dismissed, but no grounds are to be found on the record for that dismissal.

It has been pointed out in the course of the argument by the Pleader for the special appellant, that the Privy Council have ruled in the case of *Khajah Absnoollah vs. Obhoy Churn Roy*, in Volume XIII, Weekly Reporter, that a suit between an under-tenant claiming possession of land from which he has been dispossessed by the zemindar, is properly brought under Section 23 Clause 6; but this present suit is not a possessory action, but is a suit to have the plaintiff's title declared, and for restoration of possession. We therefore think that the first ground of special appeal fails altogether.

The second ground, we also think, is untenable, and we would refer in support of this view to a Full Bench Ruling in Volume XIX, Weekly Reporter, page 322. In that decision, Mr. Justice Phear, who was one of the Judges, observes that the Collector's Court, under Clause 6 Section 23 of Act X of 1859, is one of limited jurisdiction, and that it has no power to determine between the parties a question of right to the land larger than the bare *right to possession*. We may observe that there may be many cases in which a zemindar may have a right to eject a ryot, but may not pursue that right in a legal manner; and where possession will be restored, although, if the zemindar had proceeded legally, he could have ejected his ryot. It is those cases which are contemplated by Clause 6 Section 23 Act X of 1859, and by Section 27 of the present Rent Act. That view of the case was taken by the Full Bench in the case reported in Volume VII, Weekly Reporter, page 186, where the whole subject was elaborately discussed by Sir Barnes Peacock and other Judges.

On the last ground, which is on the merits of the case, both Courts have found that the Government had recognized the rights of the putneedar; and as that question is one of fact, which has been decided concurrently by the Courts below in favour of the plaintiff, we dismiss the special appeal with costs.

The 16th September 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

*Act VIII of 1859 s. 246—Withdrawal of Claim—
Cause of Action.*

Case No. 1366 of 1872.

*Special Appeal from a decision passed by
the Judge of Chittagong, dated the 27th
May 1872, reversing a decision of the
Moonsiff of Runguneeh, dated the 6th
January 1872.*

Gooroo Dass Roy (Plaintiff) Appellant,

versus

Kamala Kant Sen and others (Defendants)
Respondents.

*Baboos Doorga Mohun Dass and Kashee
Kant Sen for Appellant.*

Baboo Aukhil Chunder Sen for Respondents.

Where a claim made under Act VIII of 1859 Section 246 is withdrawn, it cannot be revived; and if the claimant is in possession, and proves no hostile acts on the part of the opposite party invading his title, he has no cause of action.

Kemp, J.—In this case the plaintiff is the special appellant. It is alleged that he purchased the disputed property from Goluck Chunder Sen on the 13th of Bysack 1230 Mughee, and that subsequently the judgment-creditors in execution of a decree against Goluck Chunder Sen, the plaintiff's vendor, attached the property. The plaintiff, special appellant, then made a claim under Section 246 of Act VIII of 1859, which was disallowed on the 6th of August 1870, and the sale took place on the 8th of August. The present suit is brought by the plaintiff to establish his right and title in the disputed property. The first Court gave him a decree. The Judge on appeal says that it is admitted the plaintiff has not been disturbed, but that he is still in possession; and, under these circumstances, the Judge is of opinion that as the plaintiff is in possession, and no attempt has been made to oust him, it was time enough to bring a suit when such attempt was made; and that until some attempt was made to disturb the possession of the plaintiff, the suit was premature. The Judge then adds that the plaintiff, of his own accord, withdrew his objection under Section 246, and that there was no adverse summary adjudication

upon which to found a cause of action. The appeal was therefore decreed.

In special appeal, the point taken is that the Judge was wrong in law in holding that the plaintiff had no cause of action, seeing that his claim had been rejected under Section 246 of Act VIII of 1859; and that, under the latter portion of that Section, the plaintiff, special appellant, is at liberty to bring a suit to establish his right at any time within one year from the date of such order.

The proceedings under Section 246 have been referred to by the pleader for the respondent, and we find that the special appellant put in a claim under that Section, stating that he purchased the property attached from Goluck Chunder Sen on the 13th of Bysack 1230 Mughee; that he was in possession; that the judgment-debtor had no title or possession; and that it was wrong to sell the property in satisfaction of a decree against the judgment-debtor. A day was fixed for the hearing of the case, or on the 6th of August. On the case coming on for hearing, the special appellant before us presented a petition to the Court stating that he had come to a compromise with the judgment-debtor and that he did not desire to pursue his claim further, and he prayed that it might be struck off. The order on this was that the application be put up with the nuthee; and on the same day a formal order was passed to the effect that as the petitioner had produced no evidence, and had not otherwise prosecuted his claim, the property attached might be sold.

Now it is very clear from these proceedings of the special appellant under Section 246, that he was not then contesting any claim under that Section, and that he allowed the petition which he put in to be disposed of on the terms of his own petition of the 6th of August to the effect that he did not wish to carry on the claim further. It is true that, on the 8th of August, after the decision was passed, he changed his mind and stated that the judgment-debtor had not kept his promise, and that he now wished to go on with the claim originally preferred by him. This petition clearly shows that he had originally abandoned his claim, and the Judge was right in holding that it could not be revived. And therefore it being found that the special appellant is in possession, and this has been admitted by him, and as there have been no hostile acts invading the plaintiff's title proved on the part of the opposite party, we confirm the decision of the Judge and dismiss the special appeal with costs.

The 17th September 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

*Possessory Suit—Plea of Lakhiraj—Onus
Probandi.*

Case No. 220 of 1872.

*Regular Appeal from a decision passed
by the Officiating Additional Judge of
Tirhoot, dated the 15th June 1872.*

Khorshed Ali and another (two of the
Defendants) *Appellants,*

versus

Baboo Dhoondharee Singh and another
(Plaintiffs) *Respondents.*

Moonshee Mahomed Yusoof for Appellants.

*Mr. C. Gregory and Baboo Chunder
Madhub Ghose for Respondents.*

In a suit to recover possession of a quantity of rent-paying land as per boundaries defined, where the defence is that the land is lakhiraj land, the property of the defendant independently of the plaintiff, it is not enough for the plaintiff to prove that the defendant's plea of lakhiraj is not made out: he is bound to show that he is owner of the particular land which he seeks to recover.

Phear, J.—We think that the case has not been completely tried in the Court below. It seems to us that two issues ought to have been raised distinctly which were not raised, and which were not apparently involved in any one of the three issues upon which the Additional Judge decided the case.

The plaintiff sues to recover possession of 4 beegahs 18 biswas and 5½ dhoores of rent-paying land, as per boundaries below the plaint defined. According to those boundaries, the 4 beegahs odd, to which the plaint referred, was made up of an undivided half share of 6 beegahs 15 cottahs and the entirety of 14 cottahs 2 dhoores.

The defence set up was that this land was lakhiraj land, and was the property of the defendant, 2nd party, altogether independent of the plaintiff or those through whom the plaintiff claimed.

The Judge commences his judgment by saying:—"We must first of all consider on whom the onus rests. In my opinion, plaintiff was malik of the mouzah, and therefore all the land appertaining to that mouzah must be inferred to belong to him as malik, unless the contrary be proved.

"It has been especially urged by the defendant that as portion of the land of this mouzah is not *mal* but *lakhiraj*, therefore on this special objection being urged, the onus of proof must rest in him (defendant)." And accordingly the Judge directed his attention to the question whether or not the land referred to in the plaint was lakhiraj land, having put the burden of proving the affirmative of the question on the defendant. He came to the conclusion upon this that the defendant's case had failed, and on that ground alone he gave a decree in favour of the plaintiff.

But in this suit it seems to us plainly not enough, in order to entitle the plaintiff to succeed, for him to prove and for the Court to be satisfied that the defendant's plea of lakhiraj was not made out. The plaintiff could only recover possession of this land from the defendant by showing that he was the owner of the land. In which event, no doubt, inasmuch as the defendant had set up a lakhiraj title, he would have a right to treat the defendant as a trespasser and to eject him.

So that the principal issue in this case which it was incumbent upon the plaintiff to prove was, that he was the owner of the particular land of which he sought to obtain possession. The Judge, however, after expressing his opinion that the plaintiff is the malik of the mouzah, gave a decree in his favour without enquiring further in detail as to whether he was the owner of this particular land or not.

The defendants in their written statement also raised the objection that the suit was barred by limitation, and it was therefore necessary for the Judge, before going into the merits of the case, to enquire whether the plaintiff, or those through whom the plaintiff claimed, had in fact had any proprietary enjoyment of these particular lands within the period of 12 years immediately antecedent to the filing of the plaint. But the Judge appears to have allowed this point to escape his attention altogether. The result is that on this record we find very little evidence, if any, upon which we could determine those two issues. It appears to us also that this has arisen as a consequence of the erroneous view of the case which was taken by the Judge. And accordingly we think it necessary to frame two issues and direct the record to be sent down to the first Court, in order that both parties may have the opportunity of giving such evidence as they may be advised to give upon those issues. The

issues are : first, assuming that the plaintiff is proprietor of the land or the share of land which is mentioned in the plaint, has he or has his predecessor in title had any proprietary enjoyment of that land within the period of 12 years preceding the date of filing the plaint? Secondly, is the plaintiff the proprietor of the land or share of the land in dispute?

The record with these issues will be sent down to the Lower Court; and when evidence has been taken, it must be returned to this Court with the finding of the Lower Court upon them.

The 17th September 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Thakbust Map—Evidence—Title—Possession.

Case No. 1496 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 7th June 1872, reversing a decision of the Moonsiff of Russoolgunge, dated the 10th February 1872.

Mahomed Bux (one of the Defendants)
Appellant,

versus

Abdool Kureem *alias* Aboo and others
(Plaintiffs) *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Grish Chunder Ghose for
Respondents.

A thakbust map, to which the defendant was not a party, is not admissible as evidence on behalf of the plaintiff.

Possession is evidence of title: and if the plaintiff proves that he had possession, and that his possession has been forcibly disturbed, he makes out a *prima facie* title for the defendant to rebut.

Kemp, J.—THE plaintiffs brought this suit alleging that the lands in dispute were homestead and purchased lands belonging to them, and that they had been in possession all along until ousted in the year 1273 by the defendant.

The first Court was of opinion that the witnesses of the plaintiffs were not respectable, and that the old decrees for arrears of rent were not admissible in evidence against the defendants, as they were not parties

thereto, and they appear to have been compromised decrees and never to have been executed; and that the witnesses for the defendants were, no doubt, more respectable than those of the plaintiffs. He therefore gave the plaintiffs a decree.

On appeal, the Subordinate Judge has prefaced his decision, as he does all his decisions probably with the view of protecting himself in special appeal, by saying that he has minutely and carefully considered the evidence of both parties. However, be that as it may, it is clear that he has found on the evidence of the ryot in possession, and also upon the kubooleut which has been proved by the witness Puddo Lochun Surma and by the evidence of the other witnesses for the plaintiffs, whom he describes to be respectable men, that the plaintiffs were in possession for a long time until forcibly ousted in 1273. With reference to the witnesses examined by the defendant, the Subordinate Judge was of opinion that they were low people, and not to be relied upon. He therefore reversed the decision of the first Court.

The Subordinate Judge has certainly admitted evidence in this case which ought not to be admitted. He was not justified in admitting as evidence the thakbust map to which the defendant was not a party: this map was not filed in the first Court, and the Subordinate Judge has not given any reasons for admitting it in the appeal stage: and moreover, we do not find on comparison of the thakbust map with the locality, as described in the ameen's map, that Chuck No. 28 corresponds in any way with the disputed land. Again, the old decrees for rent were also inadmissible; one was a decree on a compromise, and the other was obtained by the plaintiffs' representatives against the representatives of another party, and was also compromised; and these decrees were never executed. But under Section 167 of the new Evidence Act, the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision.

We cannot say in this case that the Subordinate Judge was not justified in coming to the finding at which he has arrived, upon the evidence of the ryot who was in possession and upon the rest of the evidence, to the fact of the plaintiffs' long possession until ousted by the defendants. There is a

decision in Volume XII, Weekly Reporter, by Justices Mitter and Sir Charles Hobhouse, in which it is laid down that possession is evidence of title, and if the plaintiff proves that he had possession, and that his possession has been forcibly disturbed by the defendant, he makes out a *prima facie* title for the defendant to rebut. The plaintiffs having thus made out a *prima facie* title, and the Subordinate Judge having held at the close of his judgment that the defendant has altogether failed to rebut the *prima facie* case made out by the plaintiffs, the special appeal must be dismissed with costs.

The 17th September 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

*Zemindar and Talookdar—Enhancement of Rent
—Kubooleut—Notice—Regulation VIII of
1793 s. 51.*

Cases Nos. 657 to 659 of 1873.

*Special Appeals from a decision passed by
the Judge of Chittagong, dated the 17th
December 1872, affirming a decision of
the Moonsiff of Sathane, dated the 31st
August 1872.*

Kristo Chunder Goopto (Plaintiff)
Appellant,

versus

Elahee Buksh and others (Defendants)
Respondents.

*Baboo Chunder Madhub Ghose and
Aukhil Chunder Sen for Appellant.*

*Baboo Grish Chunder Ghose
for Respondents.*

Where a zemindar sues the talookdar for enhancement of rent upon a kubooleut which he does not produce, he is bound to give evidence as to why he cannot produce the kubooleut before he can call upon the defendant to produce his pottah.

But if he sues under a notice, the grounds contained in it must be those contemplated in Regulation VIII of 1793 Section 51.

Kemp, J.—THESE cases were suits brought by the zemindar against the talookdar for enhancement of rent. The grounds upon which the zemindar proceeded to enhance are grounds which are contemplated by Act X of 1859. Both Courts have dismissed the zemindar's suits. The Judge has held that inasmuch as the plaintiff sued upon a kubooleut and did not produce that kubooleut and did not give any evidence as to

why he did not produce that kubooleut, he was not entitled to call upon the defendant to produce his pottah; and that not having given evidence to account for the non-production of the kubooleut, though suing upon it, his suit must be dismissed.

In special appeal it has been contended that inasmuch as the zemindar is entitled to receive rent for every beegah in his zemindaree, and as he was suing upon a notice, the Judge ought to have found whether the plaintiff was entitled to enhance or not.

Now we think it very clear that if the plaintiff was suing upon a kubooleut, he was bound to produce evidence as to why he could not produce that kubooleut before he could call upon the defendant to produce his pottah. If, on the other hand, he sues under the notice, we must hold under the Rulings in Volume VIII and Volume XII of the Weekly Reporter, that his notice is informal, because the grounds of enhancement contained in that notice are grounds contemplated under Act X of 1859 for cases of ryots having occupancy rights, and not grounds contemplated under Section 51 Regulation VIII of 1793, under which grounds alone the rent of a dependent talookdar can be enhanced.

Such being the case, we think the plaintiff's suits have been properly dismissed, and we dismiss the special appeals with costs.

The 18th July 1871.

Present:

Sir James W. Colville, Lord Justice James,
Lord Justice Mellish, and Sir Lawrence Peel.

*Resumption Suits—Reg. II of 1819 s 30—Onu
Probandi—Review—Jurisdiction.*

*On Appeal from the High Court of
Judicature at Fort William in Bengal.**

Nobokisto Mookerjee

versus

Koylash Chunder Bhattacharjee and others.
and

Hurryhur Mookhopadya

versus

Madhub Chunder Baboo.

* From the judgment of Seton-Karr and Campbell, JJ., in Special Appeal No. 2750 of 1864, decided 15th April 1865.

N, as durputneedar, sued for a declaration that certain lands which defendants claimed to hold as lakhiraj were held under an invalid title; the plaintiff stating that the suit was brought under Regulation II of 1819 Section 30 Clause 1. The first Court found that 2 beegahs 1 cottah of the land was not within plaintiff's putnee; that 12 beegahs 14½ cottahs had been enjoyed rent-free from before 1st December 1790; and that the rest was liable to assessment. The Lower Appellate Court confirmed the decision as to the 2 beegahs 1 cottah, but decreed the rest of the plaintiff's claim, finding that defendants had failed to prove a valid title, or that the land had been held rent-free for a period commencing before 1st December 1790. In special appeal the High Court remanded the case for re-trial, stating that the onus had been misplaced:

HELD, that the remand for re-trial upon an amended plaint was not only correct, but an indulgence to the plaintiff, whose suit ought otherwise to have been dismissed; the invocation of Regulation II of 1819 Section 30 having the effect of causing the case to be tried according to the procedure and presumptions prescribed by that enactment to the prejudice of the defendant.

If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it lies upon the plaintiff to prove a *prima facie* case, i.e., his case being that his *mâl* land has since 1790 been converted into lakhiraj, to give some evidence that his land was once *mâl*. This burden is not met by the mere fact of the lands being within the ambit of his estate.

[The above decision was held to govern the question as to the correctness of the remand in the second case, viz., that of *H. M. v. M. B.*]

It is competent to the High Court, on an application for review, to delay their final decision until a doubtful question of law has been settled by a Full Bench.

THIS appeal, and that of Hurryhur Mookhopadya, appellant, and Madub Chunder Baboo and another, respondents, were lately argued *ex parte* before this Committee. The principal question involved in them is common to both; but inasmuch as in each some subordinate point peculiar to it was also raised, their Lordships will deal with them separately. They propose to take first the appeal of Nobokisto, though the last argued, because that record contains a judgment, pronounced on the 27th of March 1865, in a third case, No. 268 of 1864,* wherein the High Court stated fully the grounds upon which the ruling impugned by both these appeals is founded.

This suit was instituted by the appellant as a durputneedar. Its object was to obtain a declaration that certain lands which the respondents claimed to hold as lakhiraj land were so held by them under an invalid title; that they were the *mâl* lands of the appellant, liable, as such, to pay rent to him, and to have them assessed accordingly. The suit was originally brought before the Collector, but, under the provisions of an Act of the Bengal Council (VII of 1862), was afterwards transferred to the Court of the Principal Sudder Ameen of Zillah Hooghly. The plaint expressly stated that the suit was

brought under the 1st Clause of Section 30 of Regulation II of 1819. Their Lordships need not consider particularly the provisions of that enactment. It is only material to observe that, in suits brought under it by a zemindar, or one to whom the zemindar's rights have been transferred, the whole burthen of proving the nature and commencement of his title was understood to be thrown upon the defendant, the lakhirajdar, whom the plaintiff, who disputes the validity of the tenure, might compel to produce the sunnuds and other ancient documents upon which such title rested. The sole proof of title which the defendant could require in the first instance from the plaintiff was that the lands in question were within the ambit of his zemindary or putnee, as the case might be. This issue the respondents in the present case did raise, and successfully raise, as to part of the land. As to the rest of the land, the only issue, except that of limitation, was whether it was the respondents' valid rent-free land or not; the whole burthen of proof on this issue being cast on them.

The Principal Sudder Ameen, the Judge of first instance, found that, of the land in suit, 2 beegahs and 1 cottah were not within the appellant's putnee; that as to 12 beegahs and 14½ cottahs, other part of that land, the respondents had proved, by certain ancient documents, that they had held and enjoyed them as rent-free lands from long before the 1st December 1790; and that consequently the claim to assess them was barred by limitation. The residue, being 3 beegahs 17½ cottahs, he held liable to assessment. Both parties appealed against this decision to the Zillah Judge, who, on the 21st June 1864, confirmed the decree of the Principal Sudder Ameen so far as it related to the 2 beegahs and 1 cottah, but reversed it as to the rest of the land, making as to that a decree in favour of the appellant's claim. The grounds of his decision were that the documents produced by the respondents were untrustworthy, and therefore that they had failed to prove either a valid title to hold the land rent-free, or that the land having been held rent-free for a period commencing before the 1st December 1790, the appellant's right to assess them was barred by limitation.

The respondent then preferred a special appeal to the High Court. Of the grounds stated for this, it is only necessary to notice the third and the fourth. The third is that the suit being brought, though improperly, under Section 30 Regulation II of 1819

* 2 W. R., Civil, 259.

was admittedly barred by limitation. The fourth that the *onus probandi* had been improperly thrown upon the defendants. On the 13th April 1865, the High Court remanded this cause, with five others, which it treated as being in the same category, to the Court of first instance, stating only that "the onus having been misplaced, these cases must go back to the first Court with reference to the principles laid down in case No. 268 of 1864."

Before considering the propriety of this remand, which is the principal question raised by the appeal, it will be convenient to complete the history of this particular case. The appellant went again before the Principal Sudder Ameen, amending his plaint pursuant to the order of remand, by striking out all reference to the Regulation II of 1819, and making it a plaint for the resumption of land fraudulently made lakhiraj after the 1st December 1790, and therefore falling within the 10th Section of Regulation XIX of 1793. The Principal Sudder Ameen thereupon framed fresh issues, the first of them being whether the land in dispute ever formed a portion of *mâl* land at the time of the Government settlement, and whether at any subsequent time it had been fraudulently made rent-free; and on the 13th September 1865, dismissed the suit upon the ground that the plaintiff, the appellant, had produced no documents or evidence in the suit, and had thereby failed to support the burthen of proof which this issue cast upon him. The appellant afterwards, in August 1865, obtained from the High Court a very special leave to appeal to Her Majesty in Council, on the ground that this suit, though the subject-matter of it was far below the appealable value, was one of a large class in which similar remands had been made. Their Lordships will assume that this leave to appeal was properly granted, and that the object of the appeal, or at least its principal object, is to test the correctness of the principle on which remands in this and similar cases have been directed, and the burthen of proof to some extent cast on the plaintiff in suits of this nature.

In order to do this, it is necessary shortly to review the law relating to lakhiraj tenures within the provinces embraced by the perpetual settlement, and some recent decisions of the High Court of Calcutta concerning it.

The foundation of that law is well known to be Regulation XIX of 1793. That statute, after affirming in the strongest terms

the *prima facie* or, so to speak, common law, right of the ruling power to a certain proportion of the produce of every beegah; after declaring all lakhiraj tenures to be exceptional and in contravention of that right; that many of the existing tenures of that kind were invalid; but that all, whether valid or invalid, had been excluded from the decennial settlement; and that the jumma assessed upon the estates of individuals under that settlement was to be considered as exclusive and independent of all lakhiraj lands whether exempted from the lakhiraj or public revenue, with or without due authority; proceeded thus to deal with the then subsisting lakhiraj tenures. It divided them into two classes, *viz.*, those created by grants made previous to the 12th of August 1765, the date of the grant of the Dewanny to the East India Company, and those created by grants made between that date and the 1st of December 1790. The former, by the second Section, were, subject to certain conditions, declared to be valid. The latter, with certain exceptions, and subject to certain conditions, were, by the third Section, declared to be invalid; and, as such, to be resumable and subject to future assessment. The Regulation then went on to sub-divide the invalid and resumable tenures into two classes, *viz.*, those which comprised lands not exceeding 100 beegahs, and those which comprised lands in excess of that quantity. The revenue which might thereafter be assessed on the former was declared to belong to the zemindar or talookdar within whose estate the lands were situate. The revenue which might thereafter be assessed on lands falling within the latter class was declared to belong to the Government. And thus the power of bringing a resumption suit to impeach a lakhiraj tenure existing at the date of the decennial settlement, and to have revenue or rent assessed thereon came to belong to the Government, or to private proprietors according to the quantity of land comprised in such tenure. Having thus dealt with all the lakhiraj tenures then subsisting, the Regulation proceeded to legislate against the future conversion of any rent-paying lands comprised in the decennial settlement into rent-free lands. This was done by the 10th Section, which is in these terms:—

[Their Lordships read the 10th Section of Regulation XIX of 1793.]

It is obvious that this enactment relates solely to lands which, on the 1st of December 1790, were *mâl* or rent-paying lands; that it treats the grant of a rent-free tenure in

such lands not as voidable, but as absolutely void; that it reserves to the Government no right in such lands unless they happened to be held *khas*; and that it positively declared that no length of possession should give validity to any such grant. It further expressly authorized the landowner to dispossess the grantee by the high hand without having recourse to the machinery provided by other Sections of the Regulation for the resumption or assessment of resumable *lakhiraj* tenures; or to any other legal proceeding.

The machinery provided for resumption suits by this Regulation of 1793 was modified by several subsequent Regulations, and in particular by the Regulation II of 1819, which has been already mentioned. And in process of time landowners seeking to enforce their rights under the 10th Section seem to have found it expedient to do so by means of legal proceedings rather than in the summary manner authorized by the latter clause of that enactment. An important distinction was, however, established by judicial decisions between a suit to enforce a claim under this 10th Section and ordinary resumption suits, whether brought by Government or individual proprietors under the earlier Sections of the Regulation. Whatever doubts may at one time have existed, it became unquestionable, after the decision of this Committee in the case of the Maharajah of Burdwan (4 Moore, L. A., 466) that the right of the Government to resume a voidable *lakhiraj* tenure comprising more than 100 beegahs was subject to the 60 years' limitation; and that by parity of reasoning, the right of a zemindar to resume a voidable *lakhiraj* tenure comprising less than 100 beegahs was subject to the 12 years' limitation. On the other hand, the Courts construing the Regulation of Limitation in connection with that part of Section 10 of Regulation XIX of 1793, which says that no length of possession shall give validity to such a grant, came (whether on sound principles or not it is immaterial here to consider) to the conclusion that the claim of a landowner under this Section was subject to no limitation. Notwithstanding, however, these distinctions between the two rights, and between the suits to enforce them, a loose practice seems to have sprung up under which landowners claiming the right to assess lands held and enjoyed rent-free, brought their suits generally under Regulation II of 1819, without specifying whether they were seeking to enforce the right given to them

by the 7th and 9th Sections of Regulation XIX of 1793, or that given to them by the 10th Section. The result was that the stringent provisions of Regulation II of 1819, and of the other Regulations *in pari materia*, were indiscriminately applied; and that in all cases the burthen was cast upon the defendant of proving by the production of ancient documents that his tenure existed before the 1st December 1790. If he established this, he would probably succeed, whether his ancient *lakhiraj* tenure was voidable or not, the suit, unless the plaintiff happened to be an auction-purchaser at a Government sale, being barred by limitation.

So stood the law and practice until Act X of 1859 was passed. The 28th Section of that statute repealed so much of the 10th Section of Regulation XIX of 1793 as authorized the landowner summarily to dispossess the grantee of a rent-free tenure; it provided that every landowner, who should desire to assess any such land, or to dispossess the grantee, should take proceedings before the Collector, which were to be dealt with as a suit under that Act; and it fixed a period within which all such suits were to be brought.

Between the passing of this Act and the beginning of the year 1865, the Courts of Bengal seem to have been somewhat divided upon several questions touching the proper mode of enforcing the claims of zemindars and other landowners, under the 10th Section of Regulation XIX of 1793; and some, at least, of such questions were finally referred for adjudication by a Full Bench, consisting of seven Judges of the High Court, in an appeal of Sonatun Ghose and others *v.* Moulvie Abdool Furer. This case, which was numbered No. 869 of 1864, was decided on the 25th January 1865, and is reported in 2 Weekly Reporter, p. 91. The Judges were divided in opinion, each delivering a separate judgment, in which the law on the subject was elaborately reviewed. But the following was the final judgment of the Court. All the Judges held that, before the passing of Regulation II of 1819, the Civil Courts under their ordinary jurisdiction were competent to entertain regular suits by zemindars for the declaration of their right to resume revenue illegally alienated subsequent to 1790, and for possession of the land held rent-free under grants or titles, which had their origin subsequently to the 1st December in that year. Four of the Judges against three held that such suits

were unaffected by the passing of Regulation II of 1819, Section 30, of which the proper operation was limited to suits for the resumption of *lakhiraj* existing prior to the 1st December 1790. And four of the Judges against three held that the jurisdiction of the ordinary Civil Court to try the suit was not taken away or affected by the 28th Section of Act X of 1859.

The second of these rulings is that which is most material to the decision of the present appeal; the necessary consequence of it being that a suit to enforce a claim arising under the 10th Section of Regulation XIX of 1793, if brought under the 30th Section of Regulation II of 1819 in order to get the benefit of the procedure there prescribed, is improperly framed.

The same case came again before a Full Bench of seven Judges,* somewhat differently composed, on the 22nd February 1865. They unanimously held that they were bound by the decision of the 25th January 1865, so far as it went. But they further decided that the regular suit which, notwithstanding the 28th Section of Act X of 1859, might still be brought to assess or resume invalid *lakhiraj* created since the 1st of December 1790, was not subject to limitation; and further, that in every fresh suit it lay upon the plaintiff to prove that the case was one falling within the 10th Section of Regulation XIX of 1793. And the Court added:—

“He must prove his allegation that the land held by the defendant, and which he claims to be *lakhiraj*, is part of the *mâl* land of the plaintiff. If he prove that fact, and show that it was assessed to the public revenue at the time of the decennial settlement, it may be presumed that the right under which the defendant claims to hold as *lakhiraj* commenced subsequently to the 1st of December 1790, unless the defendant gives satisfactory evidence to the contrary.”

In another case, decided the same day by the same Judges* (2 Weekly Reporter, p. 207), they adhered to the ruling in No. 869 of 1864, to the effect that Section 30 of Regulation II of 1819 related only to suits for resumption of *lakhiraj* created prior to the 1st of December 1790, and held that, as a consequence of that ruling, every suit alleged to be brought under Section 30 was necessarily not one to which the rule created by Section 10 Regulation XIX of 1793, of exemption from limitation, applies. They further decided that the plaintiff, having

erred in stating that the suit was brought under Section 30, should, if he wished to do so, be allowed to amend his plaint, and that, in such case, the cause should be remanded for re-trial; but that if the plaintiff did amend his plaint, he must show on the face of it, as required by the Law of Procedure, when his cause of action accrued; and if it accrued beyond the period ordinarily allowed by any law for commencing such a suit, upon what ground an exemption from the law was claimed.

There has been, so far as their Lordships are aware, no appeal from these decisions of a Full Bench of the High Court. They have since given the law to the Division Benches of that Court; and the order of remand, of which the present appeal complains, is one of many which have been made in accordance with them. The judgment in the case No. 268 of 1864,* which is set forth at page 77 of the Appendix, is, in fact, only a recapitulation of what had been decided and laid down in one or other of the above-mentioned decisions of the Full Bench.

No attempt was made at the bar to impugn the correctness of the first decision in No. 869 of 1864. It must be held, therefore, to be settled law that the provisions of the 30th Section of Regulation II of 1819 do not apply to such a suit as the appellant's; and the only questions which the appeal raises are whether, this being so, the High Court has been right in remanding this and other causes similarly circumstanced for re-trial; whether on such a re-trial the burthen of proof should be cast in the degree in which the High Court would cast it on the plaintiff; and lastly, whether there is anything in the particular case which renders such an order of remand, though otherwise correct, improper.

Their Lordships are very clearly of opinion that the remand for re-trial upon an amended plaint was not only correct, but an indulgence to the plaintiff, whose suit, if not so remanded, ought to have been dismissed. The invocation of the 30th Section of Regulation II of 1819 is not mere matter of form to be rejected as surplusage. The effect of it is to cause the case to be tried according to the procedure and presumptions prescribed by that enactment, and the enactments *in pari materia* greatly to the advantage of the plaintiff, and, consequently, to the prejudice of the defendant. It follows that,

* 2 W. R., Civil, 205.*

* 2 W. R., Civil, 259.*

if the procedure was not applicable to the case, there had been a mistrial.

Again, their Lordships think that no just exception can be taken to the ruling of the High Court touching the burthen of proof which in such cases the plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a *prima facie* case. His case is that his māl land has, since 1790, been converted into lakhiraj. He is surely bound to give some evidence that his land was once māl. The High Court, in the judgment already considered, has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the māl assets of the decennial settlement of the estate. His *prima facie* case once proved, the burthen of proof is shifted on the defendant, who must make out that his tenure existed before December 1790.

It may be objected that the result of this ruling may be that plaintiffs will sometimes fail, where under the former and looser practice they would have succeeded in assessing or resuming the land. But this can only happen by reason of the inability of the plaintiff to give *prima facie* proof of the fact which is the foundation of his title; a circumstance not likely to occur unless the defendants, or those from whom they claim, have been long in possession of the tenure impeached. Nor is it, in their Lordships' opinion, to be regretted if in such cases effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption suits under the Regulations which have now been decided to be inapplicable to suits of this nature, and by relieving defendants from a burthen which every year made it more difficult to support.

The only other point to be decided on this appeal is whether there is any peculiarity in this case which ought to take it out of the general rule. Their Lordships are of opinion that there is not. Mr. Leith argued that the defendants had admitted that the lands in question, with the exception of the small quantity no longer claimed, were within the appellant's estate. But such an admission is obviously not sufficient to meet the burthen of proof thrown upon the plaintiff. It was at most an admission that the

lands were within the ambit of the estate, not that they had ever been māl lands. In fact, the defendants strenuously asserted the contrary. The appellant, therefore, having failed to give any evidence on the second trial in support of his amended plaint, the decree dismissing his suit was right.

In the other appeal, that of Hurryhur Mokhupadya, the suit was also, on the face of it, brought under Section 30 of Regulation II of 1819, though to enforce a claim under Section 10 of Regulation XIX of 1793. In fact, in this case there was a preliminary proceeding under the 28th Section of Act X of 1859. The defendants (the respondents) undertook to prove that their tenures existed before December 1790. The Principal Sudder Ameen decided, on the 9th of April 1863, that they had failed to do so, and decreed in favor of the appellant. That decree was affirmed on appeal by a Division Bench of the High Court on the 14th of March 1864. An application for a review of judgment was made on the 10th of June 1864, on the ground, amongst others, that the appellant having stated that the lands were his māl lands, the Court had erred in throwing the onus of proof on the defendants. The review was admitted on this ground; and on the 24th of August 1865, the Court made an order in these terms:—"A notice will issue to the other side, when the case will be argued whether or not our decision, which has been overruled by a subsequent ruling of the Full Bench, should not be altered." And on the 6th of September 1867, the Court made the second order for a remand, saying: "The onus being on the zemindar, he will be permitted to amend his plaint; and he will have to prove that the land is māl, by showing that he has received rent for the same."

Their Lordships conceive that, subject to the point which will be subsequently noticed, the question whether this remand was correct, must be governed by their decision on the other appeal. They do not think that the order is vitiated by the specification of one amongst the various methods by which the plaintiff might prove his case. They do not conceive that the High Court really meant to limit him to that kind of proof. It was, however, argued by Sir Roundell Palmer that the remand of this particular case was improper, because the cause had already been finally decided in the appellant's favor; and ought not to have been admitted to a review, in order to give the defendants the benefit of what had been decided in other

cases after such final judgment had passed. Their Lordships, however, observe that the application for a review seems to have been regularly made within ninety days of the date of the decree sought to be reviewed, pursuant to Article 377 of the Code of Procedure; and this being so, their Lordships conceive that it was competent to the High Court to delay, if they did delay, their final decision on that application until the law, on which so much doubt existed, had been settled by the judgments of the Full Bench of the High Court, which have been already noticed. Therefore, in this case also, their Lordships think that the final order of the High Court was correct. They will, accordingly, humbly advise Her Majesty to dismiss both appeals. As the respondents have not appeared on either, it is unnecessary to say anything about costs.

The 17th September 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Mal and Lakhiraj Lands—Evidence.

Case No. 233 of 1872.

*Regular Appeal from a decision passed by
the Subordinate Judge of Bhaugulpore,
dated the 16th August 1872.*

Bishnath Chowdhry (Plaintiff)
Appellant,
versus

Radha Churn Gangooly (Defendant)
Respondent.

*Baboos Sreenath Doss and Mohinee Mohun
Roy for Appellant.*

*Baboos Romesh Chunder Mitter and Bama
Churn Banerjee for Respondent.*

The mere fact of particular lands falling within the geographical limits of an estate which is leased, does not show that they are *mal* lands for which rent is paid.

Phear, J.—THE suit sets up, as the plaintiff has it, a claim for resumption and assessment of rent in reference to the 109 beegahs 2 biswas and 17½ dhoores of land in five plots, butted and bounded as is described in the schedule annexed to the plaint, and situated in Kusba Kahalagoon and Mouzah Jhujjao.

The defendants say that this land did not belong to the plaintiff at all, but was lakhiraj land of certain persons whom they name, and that, by several series of conveyances which are respectively set out, came ultimately to be the property of first party, defendant.

The defendants also set up the plea of limitation.

Now, on this latter plea, it was incumbent upon the plaintiff to show that he had proprietary enjoyment of this land within the period of twelve years antecedent to the suit. And on the merits of the case, it was also incumbent upon him to show that the land in respect of which the suit is brought was in fact his property, and that he was entitled to recover rent for it from the defendant.

The only evidence by which he has endeavoured to discharge either of these obligations is evidence which goes to the effect of showing that 8 annas of Kusba Kahalagoon and Mouzah Jhujjao Chuck, in which this property is said to be situated, were some years ago leased to Mr. Barnes for his life, and that the remaining 8 annas were leased to him also for a term of years which ended in Kartick 1273; that during this holding of Mr. Barnes, a butwarah was effected of the property, by which the 8 annas share, the subject of the ticca lease, was separated from the rest, and was allotted to the plaintiff; and the lands in question fell within the portion of the mouzah which was allotted to the plaintiff; together with the further evidence which is furnished by the admission of the defendants in their written statement that they obtained these plots of land by conveyance from Mr. Barnes. These form the only materials, as far as we understand the case, upon which the plaintiff relies for the purpose of rebutting the plea of limitation in the first place, and of supporting the issue on the merits in the second place. But it seems to us that on these materials alone the plaintiff fails to make out that he or his predecessors had received any rent in respect of these specific lands, or otherwise had enjoyment of them within the period of limitation. That the lands fell within the geographical limits of the mouzah, which was formerly as regards 8 annas, let in ticca to Mr. Barnes, even if it be proved, does not of itself show that these particular lands were *mal* lands for which Mr. Barnes paid rent. And if this evidence fails to show that the plaintiff either through Mr. Barnes or otherwise received rent in respect of these lands, then it seems very clear that neither the burden which lay upon the plaintiff in consequence of the plea of limitation, nor the burden which lay upon him in order to support his own claim, was discharged.

It may be added that on the evidence given by the plaintiff's own witnesses,—on the testimony indeed of the plaintiff's own son,

—it would appear that Mr. Barnes had within this mouzah some lakhiraj lands. This does not go very far, no doubt, to prove the defendant's case, but it seems to make it especially incumbent upon the plaintiff to show that the particular lands for which he sues were not the lakhiraj lands of Mr. Barnes.

We may refer to the decision of the Privy Council, which is reported in XIV Moore's Privy Council Indian Appeals, page 172,* as an authority for the position that the mere fact of the lands being within the limit of an estate does not afford evidence that they are mal lands.

We therefore are of opinion that the decision of the Lower Court is right, and that this appeal ought to be dismissed with costs.

The 17th September 1873.

Present :

The Hon'ble W. Markby, *Judge.*

Act VIII (B.C.) of 1869, ss. 3 and 4—Invalid Lakhiraj—Decree—Evidence.

Case No. 477 of 1873.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 12th November 1872, affirming a decision of the Moonsiff of Bishtopore, dated the 28th August 1872.

Banee Madhub Banerjee and others
(Plaintiffs) *Appellants,*

versus

Bhagbut Pal and another (Defendants)
Respondents.

Baboo Bungshee Dhur Sen for Appellants.

Baboo Rash Beharee Ghose for Respondents.

Sections 3 and 4 Act VIII (B.C.) of 1869 apply also to invalid lakhiraj grants resumed at a time subsequent to the permanent settlement.

A decree for rent at a certain rate is not conclusive proof that the land was held for the years to which the decree relates at that rate, until it has been executed.

Markby, J.—THE first point that is taken in special appeal ought not to be entertained. It is not taken in the petition of appeal, and further than that it seems to me that if the present special appellant had desired that the Courts below should infer that this tenure, although it has been held by payment of rent at an uniform rate for upwards of twenty years, did not come into existence

until after the permanent settlement, he should have presented that view of the fact to the Courts below and asked them to come to that conclusion.

As to the second point, namely, that Sections 3 and 4 of Act VIII of 1869 (B.C.) do not apply to lands which had been held under an invalid lakhiraj grant and had been resumed at a time subsequent to the permanent settlement of the province in which they are situated, I think there is no ground for such a contention. The words of those Sections taken in their ordinary sense clearly apply to these ryots, and the permanent settlement of the province is only referred to for the purpose of fixing the date from which the period is to be computed.

The main point for consideration seems to me to be whether or not the landlord has a right to say that the decree of 1868 against the tenant for rent at a higher rate is a conclusive proof, incapable of being explained away by any evidence on the part of the tenant, that the land was held for the years to which that decree relates at a higher rate. Now, undoubtedly, even an *ex parte* decree is, ordinarily speaking, conclusive between the parties upon the points adjudicated. But I think there are peculiar circumstances in this case which might leave it open for the Courts to infer that that decree is not conclusive in this proceeding, that this land was held at the higher rate. In the first place, the decree was never executed; and, as observed by the Moonsiff, although it would be presumed that the decree was conclusive, yet it is not quite certain that it is so until it has been executed, because, under the provisions of Section 58 of Act X of 1859, under which this decree was obtained, the party has fifteen days' time after the first execution of the decree to come in and object that he has not been properly served. And, in the second place, there are circumstances in this case which may lead us to infer that that decree was not executed because it was subsequently ascertained not to have been well founded. Rightly or wrongly (it is not necessary now to inquire) the officer engaged in making the settlement after resumption did raise this tenant's rent from the rate at which he was all along holding to a higher rate. Subsequently to that (rightly or wrongly, it is again not necessary to inquire) that proceeding was set aside, and it is quite possible that although this latter proceeding may not have been quite formal, yet the zemindar

* See last preceding case, page 459.

may have known that in justice this proceeding was right, and that the decree ought not to be executed. I think, therefore, that the Courts below were at liberty, under the circumstances of this case, to infer, notwithstanding the production of the *ex parte* decree, that the rent of this land has not been varied since the time of the permanent settlement.

The result is that the special appeal will be dismissed with costs.

The 18th September 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble J. B. Phear, Judge.

Indian Contract Act, 1872, s. 108, Exception I—Possession—Title.

Case stated for the opinion of the High Court, under Section 55 of Act IX of 1850, by Mr. G. C. Sconce, one of the Judges of the Court of Small Causes at Calcutta.

A. Greenwood & Co. (Plaintiffs)

versus

E. W. Holquette (Defendant).

The possession which is meant by the first part of Exception 1, Section 108 of the Indian Contract Act, 1872, is a possession which is unqualified and not to be restricted otherwise than by the owner giving instructions to the person who has it.

It is the kind of possession which a factor or agent has, where the owner of the goods, although he has parted with the possession, may give instructions to the person in possession what to do with the goods. It is such possession as an owner has; and in such a case the person selling contrary to his instructions, gives a title to a buyer acting in good faith. The Exception does not apply where there is a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose, in which case the owner has no right to give instructions.

Case.—The plaintiff sued in trover for Rs. 350 for the conversion by the defendant of a piano. The plaintiff had let a piano, worth Rs. 460, on hire to Mr. M. M. Datta upon terms which appeared in the following voucher given by Mr. Datta himself to Mr. Smith:—

Calcutta, 1st February 1872.

Received from Greenwood & Co. a new Doring's square, No. 2318, on hire at Rs. 30 per month; if duly paid for and kept three years, shall then become the property of hirer.

(Sd.) M. M. DATTA.

The monthly hire was not regularly paid; and on the 28th of May, the plaintiff recovered a judgment before the 2nd Judge of this Court against Mr. Datta for Rs. 150, being all arrears of hire due up to the 2nd May last at Rs. 30 per month for five months.

Previous to the institution of that suit he had received the following letter from Mr. Datta:—

2 Baneapookur, 15th May 1873.

GENTLEMEN,

I regret to say that having been long confined to my bed, I am not in a position to meet your demand to-day. I am however ready to return the piano and to make arrangements to pay you the sum I owe; hoping to be favored by a reply

Yours faithfully,

(Sd.) MICHAEL M. DATTA.

In July last Mr. Smith, the proprietor of the firm of Greenwood & Co., ascertained that the piano was in the possession of the defendant; and on demanding its return was met by a refusal. He then instituted this action.

Shortly before the end of May, the defendant bought the piano from Mrs. and Mr. Datta and got delivery on the 2nd June; and I found that the buyer acted "in good faith" and under circumstances which were not "such as to raise a reasonable presumption" in his mind that the person then in the "possession of the piano had no right to sell."

Mr. Datta was not in possession of any document showing title, and the contract between the plaintiff and Mr. Datta contemplated a sale of the piano at the end of three years; but I was of opinion that Mr. Datta was, at the time of the sale to the defendant, in the position merely of a bailee for hire; and that unless the defendant had acquired a good title by the operation of the Indian Contract Act, Section 108, Exception I, the plaintiff would be entitled to judgment. *Loeschman vs. Machin*, 2 Starkie, 311; *Cooper vs. Willomatt*, 1 C. B., 672.

The words of the enactment are these—

"108.—No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases:—Exception I.—*When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery or other document showing title to goods,*

he may transfer the ownership of the goods of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto notwithstanding any instructions of the owner to the contrary;—Provided, that the buyer acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.”

I was at first inclined to hold that the Section did apply, and that Mr. Holquette had acquired the ownership of the piano; but after full consideration of the terms of the Exception, and of the illustration appended thereto, I arrived, not without hesitation, at the opposite conclusion.

Mr. Datta had possession of the piano by virtue of a contract which gave him a right to the possession of the piano against the consent of the owner so long as he paid the hire: and he had possession, with the consent of the owner, only for the purposes of the contract. Consent accompanied the possession without giving it; and it appeared to me that Mr. Datta had possession “by” the contract, and not “by” the consent of the owner, and that such a possession was not a possession “by the consent of the owner” within the meaning of the Exception. Further, the words “*notwithstanding any instructions of the owner to the contrary*” seem, as I think, to indicate that the possession contemplated was only that of an agent of the owner by no other right than the owner’s consent, for the purpose of sale or otherwise on the owner’s account, as the owner by his instructions might direct; a possession such as that held by B in illustration (b): or by A in illustration (c),—a possession by no other right than by the owner’s consent, and which the owner had the right at least, if not at the moment the physical power, to control.

No illustration is given which would meet the facts of this case, or the position of any ordinary bailee having a right to the possession of goods as against the true owner, or for purposes other than the owner might direct. This circumstance of itself seems to afford strong ground for supposing that the Section was not intended to apply to such a case as the present.

I was further influenced by the consideration that if the Section 108, Exception I, were applicable to cases of ordinary bailment, any bailee would be able behind the owner’s back, and without reference to the real value

of the property (which to the owner might greatly exceed its intrinsic worth) to transfer a title to the buyer at such price as he, the bailee, might choose to set up on the article sold. For instance, a tenant of a furnished house or furnished lodgings might dispose of all his landlord’s property piece by piece. The result would be the same, whether the article sold was a chair worth Rs. 5, some article of ornament or luxury worth as many hundreds, or a picture hanging on the wall, for the loss of which, as a family picture or a work of art, no money damages might compensate the owner. The act of sale might amount to criminal breach of trust or dishonest misappropriation on the part of the bailee of the goods—an act only technically, and not morally, distinguishable from theft. The loss would fall on the owner, who would virtually be without any remedy against an impecunious and fraudulent bailee, except such as he might find in the Criminal Courts. A thief selling the goods he has stolen can transfer no title in them to the purchaser; and I do not understand why a person who, by sale, commits a criminal act equally heinous should be able to transfer the ownership in the goods he sells. The owner too is at this disadvantage, that he may from sheer ignorance of the circumstances under which the sale took place, find it extremely difficult, if not impossible, to rebut by direct testimony, or to test by cross-examination, the allegations of the purchaser with respect to the *bona fides* of the purchase which has taken place altogether behind the owner’s back.

I think it may be gathered from the words of the Section 108, Exception I, of the Indian Contract Act, that it was not intended to be applicable to the case before me; that the possession of the piano by the bailee, Mr. Datta, was not a possession by consent of the owner within the meaning of Exception I; and that therefore he did not, by selling to a buyer acting in good faith and under circumstances which were not such as to raise a presumption that the person in possession of the goods had no right to sell the goods, transfer the ownership in the goods to the buyer.

I still, however, entertain some doubt as to the correctness of my opinion, and I therefore reserved judgment, contingent on the opinion of the Honourable the Judges of the High Court on the following questions:—

1st. Was the possession of Mr. Datta a possession by consent of owner within the

meaning of the Exception I Section 108 of the Indian Contract Act?

2nd. Did he by sale to a *bona fide* purchaser under the facts found transfer the ownership in the goods to the buyer?

If these questions are answered in the negative and in accordance with the opinion I am inclined to take, my judgment will be for the plaintiff. If they are answered in the affirmative, my judgment will be for the defendant.

The judgment of the High Court was delivered as follows by

Couch, C. J.—The plaintiffs in this case, Messrs. Greenwood & Co., let to Mr. Datta a piano, which was said to be worth Rs. 460, on hire upon terms that are stated in a paper signed by Mr. Datta, and which is as follows:—

“Calcutta, 1st February 1872.

“Received from Greenwood & Co. a new Doring’s square, No. 2318, on hire at Rs. 30 per month; if duly paid for and kept three years, shall then become the property of hirer.”

(Sd.) M. M. DATTA.”

It is stated in the case before us by the Judge of the Small Cause Court that the monthly hire was not regularly paid; and on the 28th of May the plaintiff recovered a judgment before the 2nd Judge of the Small Cause Court against Mr. Datta for Rs. 150, being all arrears of hire due up to the 2nd May last, at Rs. 30 per month, for five months: and that on the 15th of May 1873 Mr. Datta wrote a letter to the plaintiffs, in which he said that he was not in a position to meet the demand on that day, and that he was ready to return the piano and to make arrangements to pay the sum he owed. Shortly before the end of May, the defendant, Mr. Holquette, bought the piano from, as is stated in the case, Mr. and Mrs. Datta, and got delivery of it on the 2nd June; and Mr. Smith, who constitutes the firm of Greenwood & Co., having in July last ascertained that the piano was in the possession of the defendant, demanded its return, and having been met by a refusal instituted this suit to recover Rs. 350 as damages.

The Judge of the Small Cause Court was of opinion that the plaintiff was entitled to recover. He found “that the buyer acted in good faith, and under circumstances which were not such as to raise a reasonable presumption in his mind that the person then in the possession of the piano had no right to sell;” but he still held that Mr. Datta,

the seller, could not give to the defendant a better title to the piano than he had himself. Although he was of that opinion, he felt that there was some doubt raised by Section 108 of the Act which has been lately passed for defining and amending the law relating to contracts, called the Indian Contract Act, 1872, and he has reserved the question as to the construction of that Section for the opinion of this Court.

The Section provides that “no seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases:—

“Exception I.—When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper’s certificate, wharfinger’s certificate, or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary: Provided, that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.”

I have already noticed that the Judge of the Small Cause Court has found that the buyer in this case did act in good faith, and therefore we have to consider what is the meaning of this Exception. It is a question of some importance, and it would have been better that it should have been argued by Counsel, because a decision upon this Contract Act may have frequent application; but in the way in which it comes before us, being reserved by the Judge of the Small Cause Court himself on a doubt which he entertained, and not at the request of either of the parties in exercise of the right which is given by Act XXVI of 1864, where it is in the nature of an appeal from the judgment of the Small Cause Court, we must give our opinion after the best consideration which Mr. Justice Phear and I have been able to give to it. The opinion which I am about to give is our joint one.

In considering what is the meaning of the Exception, we must look at the words of it. The cases of *Cooper vs. Willomatt* and *Loeschman vs. Machin*, which the Judge of the Small Cause Court has referred to, cannot, we are of opinion, be used to

guide this Court to a decision upon it. In construing this Act, which is to be the law of contract for India, we must not adopt as a rule of construction that it was intended to make the contract law of India the same as the law of England. Indeed there are reasons for thinking that the Legislature intended that in some respects there should be a different law for India, and therefore we cannot refer to any English case as a guide. We must look at the words of the law, and taking the whole of the Exception, gather from them as well as we can what was the intention of the Legislature.

The words are—"When any person is, by the consent of the owner, in possession of any goods . . . he may transfer the ownership of the goods of which he is so in possession . . . to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary." Now the last words appear to show that the possession, which is meant by the first part of the Exception, is a possession which is unqualified, and not to be restricted otherwise than by the owner giving instructions to the person who has it. It is the kind of possession which a factor or an agent has, where the owner of the goods, although he has parted with the possession, may give instructions to the person in possession what to do with the goods. He may instruct him to sell for not less than a particular price, or not before a particular time. It is such possession as an owner has, and in such a case it seems to have been intended that the person selling contrary to his instructions should give a title to the buyer, if the buyer acted in good faith. We think the Exception does not apply where there is only a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose. In such a case the owner has no right to give instructions. The nature of the possession and the powers of the person having it are determined by the contract of hiring or the contract under which possession was taken; and is of a different nature from the unqualified possession which I have mentioned where the owner has power to give instructions. The hirer has only a qualified possession. He acquires a right of possession only for the particular period or purpose stipulated. By the Roman law, the hirer acquired no property in the thing hired. By the English law, he has only a special property during the continuance of the contract or for the purposes expressed or implied by it. By the sale of the thing, his right of possession

and his special property are both determined. Thus his possession is of quite a different character from the possession which we think was intended by this Section, taking it as a whole. We are therefore of opinion that the plaintiffs are entitled to recover the damages claimed in the suit, and that judgment should be entered for the plaintiffs with costs of suit and the costs of stating and reserving the case for the opinion of this Court and arising thereout.

The Judge of the Small Cause Court has made a slight error in the mode of referring this question; because, instead of giving judgment for the plaintiff, and making it contingent upon the opinion of this Court, he appears to have reserved his judgment until he received the opinion. This is not quite correct; but we did not consider it worth while to send the case back for him to correct it, being a mere error in form. We therefore treat the case as if he had given judgment in the proper way for the plaintiff, contingent on the opinion of this Court; and decide that the plaintiff is entitled to judgment with costs.

The 18th September 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Act VI of 1871—Ministerial Officers—Judge's jurisdiction—High Court's powers.

In the matter of

Fakeer Chand Lall, *Petitioner.*

Baboo Boodh Sen Singh for Petitioner.

A Moonsiff having charged his serishtadar with carelessness and irregularities, recommended his transfer to some other Moonsiff. The Judge, after calling for and receiving an explanation from the serishtadar, dismissed him from office. The High Court refused to interfere in the exercise of its general power of superintendence, holding that although the Judge had exercised an original power, where he had only an appellate

jurisdiction, he had done so on a complaint made by the Moonsiff, and the petitioner, if aggrieved, had a remedy under Act VI of 1871 in an application to the Local Government.

Phean, J.—We think that we ought not to interfere in this case. When on a former occasion* I expressed the opinion that the Sections in Chapter VI of the Bengal Civil Court's Act did not have the effect of taking away from this Court the general power of superintendence, even in regard to the particular matter of those Sections, I also stated, what has over and over again been enunciated by the Court, that these extraordinary powers would not be exercised by the Court except in a case in which the Court was satisfied that the petitioner ought to have a remedy afforded to him, and that if the Court withheld its action he would lose all remedy. The powers were not given to the Court in order that it might act as a Court of appeal, but only that on emergencies it might take care that the officers in Courts subordinate to it exercised their discretion in the right and proper manner.

It appears to us on the present application more than doubtful whether the petitioner has any real grievance. According to the representation of the petitioner, no doubt the Judge exercised an original power where he had only an appellate jurisdiction. He did this, however, upon the foundation of a complaint made by the Moonsiff, and there is very little room to doubt that if we sent this case back and told the Judge that his order was irregular, and that he should have waited until the Moonsiff had first removed the petitioner before he himself took action, the result would very soon follow that the petitioner would be removed by the Moonsiff. But whether this would be so or not, it is quite plain that the petitioner has under these very Sections the right to apply to the Local Government for redress. In truth, if the Moonsiff's application to the Judge had been assented to by the Judge, the Judge would have then been obliged to carry the matter to the Local Government; and it seems that there is no reason at all why the present petitioner should not be left to an application of that kind for his remedy, if he has a right to it.

The application is refused.

* 19 W. R., 148.

The 18th September 1873.

Present:

The Hon'ble F. A. Glover and G. G. Morris,
Judges.

*Religious Endowment—Sale by Mohunt—
Vendor's Title.*

Case No. 1078 of 1872.

*Special Appeal from a decision passed by
the Officiating Judge of Bhaugulpore,
dated the 12th April 1872, affirming a
decision of the Subordinate Judge of that
district, dated the 4th May 1871.*

Mohunt Burm Suroop Dass (Defendant)
Appellant,

versus

Khashee Jha and others (Plaintiffs)
Respondents.

*Baboos Unnoda Pershad Banerjee, Annund
Chunder Ghosal, and Abinash Chunder
Banerjee for Appellant.*

*Baboos Nil Madhub Bose, Grija Sunker
Mozoomdar, and Tarahant Chuckerbutty
for Respondents.*

A mohunt in charge of endowment, with only a life-interest in the property, cannot create an interest superior to his own, or, except under the most extraordinary pressure and for the distinct benefit of the endowment, bind his successors in office. If a purchaser from such mohunt retained possession after the mohunt's death, the successor to the guddee would have a cause of action against him from the date of the election; and no length of possession during the vendor's life-time would give the purchaser a valid title as against the present mohunt.

Morris, J.—The point taken in this special appeal is that the Courts below ought to have entered upon the question of the plaintiff's title, and have found whether the property claimed was or was not alienable.

Neither of the Lower Courts tried this issue, holding it sufficient that the plaintiff had proved an uninterrupted possession of 20 years.

We think that this was not sufficient. As against the owner of the estate, it would be

enough], no doubt, to prove an adverse possession for more than 12 years, to establish a title in the party in possession, and to extinguish it in the owner; but so far as the case has been made clear to us, the plaintiff's vendor was not the owner of the land: he was the mohunt for the time being in charge of the endowment, and had only a life-interest in the property. In that event he could not create a title superior to his own, or, except under most extraordinary pressure and for the distinct benefit of the endowment, bid his successors in office. A purchaser from the mohunt of an endowment of the kind alleged in this case would only take an interest commensurate with the mohunt's life; and if he retained possession after the mohunt's death, the successor to the guddee would have a cause of action against him from the date of the election. If this were not so, any mohunt who was inclined to commit waste on an endowment, and who lived long enough, might ruin the property entrusted to his charge, and leave his successor remediless, if more than 12 years had elapsed since the alienations.

It has been argued that Section 5 of Act XIV of 1859 applies to this case; but this is not so. That Section applies only to suits brought by a *cestui que* trust to recover property from the hands of those who have purchased it from a trustee. Now the vendor in this case was no body's trustee, nor was there any one who could interfere with his management of the property, so long as he remained mohunt. No one could have had a cause of action against a purchaser, however improperly the sale may have been made to him, whilst the mohunt who sold remained on the guddee. We think that this entirely disposes of the objection raised.

It seems to us, therefore, that unless the plaintiff can show that the sale to him was one that could be legally made by the mohunt in possession, no length of possession under that sale during his vendor's life-time will, supposing the property to be endowment property, give him a valid title as against the present new head of the endowment.

We remand the case to the first Court for trial of this issue. Costs to follow the result.

We will add that it does not seem that the point was ever taken by plaintiff in the Court of first instance that the land was private property of the mohunt and formed no part of the endowment. But if it was taken, we think that plaintiff should be allowed to adduce proof on this head in support of his title.

The 19th September 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Wills—Bequest to nearest Sapinda.

Case No. 245 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Dinagepore, dated the 22nd August 1872.

Ramguttee Acharjee (Defendant) Appellant,

versus

Kristo Soonduree Debia (Plaintiff)

Respondent.

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Where a will gave the testator's widow permission to adopt and made provision for the adopted son entering into possession after her death, providing further that if the adopted son died unmarried, the estate should pass to the testator's nearest *sapinda gyanti*:

Held that the gift or bequest was, according to the doctrine laid down by the Privy Council in the case of *Tagore v. Tagore*, void and of none effect because the nearest *sapinda* was a person who might not be in existence at the death of the testator, being one who could not be ascertained at that time.

Couch, C.J.—THE suit was brought by the plaintiff, the widow of Prosunno Chunder Roy, for a declaration of right in three annas six gundahs two curras and two krants share of the zemindaree which she stated was owned and held by Jadubendro Acharjee, the maternal grandfather of her husband, and on the death of Jadubendro Acharjee, his son Hem Chunder Acharjee held the undisturbed possession thereof, and he died while a bachelor and a minor on the 22nd of Assin 1270, upon which the plaintiff's husband inherited all the properties left by his maternal grandfather and maternal uncle as heir, and being a minor held possession thereof through his guardian and paternal grandmother Tara Debia. The plaint says he died in Joisto 1271, being still a minor, leaving the plaintiff his only wife and heir, and made a will permitting her to adopt a son, whereupon she inherited his share in the property claimed, in the suit, and held possession thereof. It then alleges that the defendants set up a false claim to the property, and, as she called it, dispossessed her from her share; therefore she brought the suit.

One defence of the appellant Ramguttee

Acharjee was that Hem Chunder Acharjee died in 1270 and that from that time the defendants had held the property in right of inheritance, and that the plaintiff's suit was barred by limitation.

The Lower Court has found against this defence, and it was not contended before us that this finding was wrong. And, indeed, it could not with any prospect of success have been so contended, because the deposition of this defendant, the now appellant, showed that the plaintiff must have been in possession at some time within 12 years. It is a defence which is constantly set up without any ground for it, and is very frequently supported by the kind of evidence which it is most easy to obtain. Probably it is a defence which is more frequently suggested by the mookhtar or pleader who prepares the written statement than by the party himself. The plaint and written statement, being a statement by the parties themselves of the facts of the case, are rather the result of the labors of the pleader or mookhtar in the case, and often show a considerable disregard of the true state of the facts. The eighth paragraph of the written statement contains what was the substantial defence. That is as follows:—"The deed of permission executed by Jadubendro, while living, to his wife for adopting a son, recites in distinct terms that on the death of the adopted son, a bachelor, the properties left by him would descend to us, i.e., his *gyanties*, or agnate relations. The deed of permission was kept by Gobind Chunder Audhikaree, natural father and guardian of Hem Chunder, in his own custody, and on the death of Hem Chunder he made a private settlement with the plaintiff of their respective shares, and with his own costs made the plaintiff bring this suit."

Here, again, there is an allegation of collusion between Gobind Chunder and the plaintiff for which there does not appear to be any foundation whatever in the evidence in the suit, and which is inconsistent with the fact that Gobind Chunder produced the deed of permission upon which the defendants relied.

The Subordinate Judge has decided against the defendants on the ground that the deed of permission which they produced was not a genuine document. We have some doubt whether his decision can be supported upon that ground.

Two witnesses were called who proved that the document produced was executed.

The judgment of the Subordinate Judge, although it may be right, proceeds rather upon suspicion than upon any evidence in the case, and we should probably have attributed more weight to what he says as to the improbability of such a deed as this being made by Jadubendro. If he had been a Hindoo gentleman, instead of being, as he was, a Mahomedan gentleman. Probably, he would then have been better able to judge as to what was likely to be done. We think his judgment is open to considerable doubt. It has been said on more than one occasion by the Judicial Committee of the Privy Council that it is not right to set aside the evidence of witnesses against whose truthfulness nothing is shown merely upon suspicion,—upon an opinion of the Court that the transaction was not a probable one.

But it is not necessary for us to say positively whether the deed of permission produced by the defendants is genuine or not; for assuming it to be the deed which was made by Jadubendro, we think it does not entitle the defendants to keep the property. We have had it translated. After stating that he had no son, and that his constitution was gradually failing and it had become necessary for him to grant permission to adopt a son, it says:—"Accordingly I have given you" (that is, his wife,) "permission to adopt a son, and grant this deed of permission to the effect that on my death you shall receive in gift a boy of a good Brahmin family; in accordance with the Hindoo law make him adopted son on performance of pootristi jag, &c., and cherish and support him." * * "On my death, you shall remain in possession of my entire estate, real and personal, and have absolute control over it as long as you may live" * * "During your life-time the said adopted son shall not obtain possession of any property belonging to my estate. On your death, the said adopted son shall enter upon possession of the said entire estate with powers to alienate by sale or gift and continue to enjoy it down to his sons, son's sons, &c." Then it makes a provision for his widow, allowing the adopted son a maintenance during her life; and it afterwards has this passage:—"God forbid, should the said adopted son die unmarried, I see no means to secure the performance by others of the service of the deities and other rites and ceremonies established by my ancestors; and feeling the necessity for maintaining the said institutions, I do hereby provide that my entire

"estate, real and personal, shall pass to my nearest *sapinda gyanti* who shall perform the service of the deities and other rites and ceremonies established by my ancestors, and continue to enjoy the same down to his sons, son's sons, &c."

It is not necessary to say what precise interest the widow took under this will, whether the provisions as to what she should do and the control she should exercise amount to any thing more than powers to manage the property, it being the property of the adopted son. The gift or bequest upon which the defendants relied is, according to the doctrine which has been laid down by the Judicial Committee in the case, *Jatindra Mohun Tagore v Ganendra Mohun Tagore*,* a void one and cannot take effect to give the property to the defendants. In that case their Lordships say, IX Bengal Law Reports, 400,† that for the reasons stated, they are of opinion "that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator."

Here, the person named in this part of the deed, or will, namely, the nearest *sapinda* was a person who might not be in existence at the death of the testator. He was a person who could not be ascertained at that time. In a gift of this kind, regard is had to possible and not to actual events, and the fact that it might have included objects too remote is fatal to its validity. Even if it could be shown that the nearest *sapinda* on the death of the adopted son was the same person as the nearest *sapinda* on the death of the testator, it would not make it valid.

Applying this doctrine, we may hold that the gift or bequest over, is invalid. In the judgment in *Tagore v. Tagore*, their Lordships refer to the case in IX Moore's Indian Appeals, 154,‡ which was quoted to us for the appellant, and they explain it and show that it must not be considered as an authority for any other doctrine than that which they lay down in *Tagore v. Tagore*. We must dismiss the appeal, although we do not come to the conclusion in favor of the plaintiff upon the same grounds as the Lower Court did. The appeal will be dismissed with costs.

* 18 W. R., 359.

† *Id.*, 367.

‡ 4 W. R., P. C., 114.

The 19th September 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Misapprehension of Evidence—Improper Admission or Rejection of Evidence—Grounds for Remand.

Case No. 1649 of 1872.

Special Appeal from a decision passed by the Second Subordinate Judge of Bhaugulpore, dated the 7th August 1872, reversing a decision of the Moonsiff of Monghyr, dated the 30th December 1871.

Nowab Khan (Plaintiff) *Appellant,*

versus

Rughoonath Doss and others (Defendants)
Respondents.

Mr. M. L. Sandel for Appellant.

No one for Respondents.

Where the Lower Appellate Court misapprehended the documentary evidence, mistook the statements of witnesses, and without recording clearly its reasons for doing so, sent for documents which had not been put in evidence before the first Court; and also came to the conclusion that certain documents, whose authenticity had been sworn to, were fabricated, merely because their appearance seemed to indicate this, the High Court in special appeal held that the case had not been properly tried and remanded it for re-trial,—excluding from the evidence on the record the evidence which had been received in the appeal stage without any reasons being recorded for its admission.

Phear, J.—We have unfortunately not had the advantage of any argument on the side of the respondent, but from the perusal of the judgments of the two Courts, and after a consideration of some of the evidence, which has been pointed out to us upon the record, we are of opinion that the trial in the Lower Appellate Court has not been complete and satisfactory. The Subordinate Judge has fallen into more than one error of a material kind with regard to the character of the evidence. He attaches very great importance indeed to the absence of accurate boundaries in the *kobalah* by which the plaintiff claims to be entitled to the 5 beegahs. He says:—"If in the *kifta* of 81 beegahs and some cottahs, the vendor of the plaintiff had a share to the extent of 5 beegahs, and held it under his possession, then the *kobalah* of sale of the plaintiff would fully and accurately define the boundaries of those 5 beegahs. But

"instead of doing so, the vendor of the plaintiff has defined therein the boundaries of the entire 134 beegahs. Hence, it is impossible to determine for what particular parcel out of the one-third share of those 134 beegahs the plaintiff has obtained a right."

This remark of the Subordinate Judge is manifestly founded upon a misapprehension of the evidence; for, it has been made clear to us that the boundaries given in the plaintiff's kobalah are not the boundaries of the 134 beegahs, but are other and different boundaries—boundaries which may well be the correct boundaries of the 5 beegahs which the plaintiff seeks to recover in this suit.

A little further on again in his judgment the learned Subordinate Judge returns to the same point. He says:—"If it be true that the said 5 beegahs out of 81 beegahs, which plaintiff's vendor and his witnesses aver to be the right of the said vendor, were actually under his (vendor's) possession, then he would have boldly defined the boundaries of those 5 beegahs in the deed of sale; but as the plaintiff received the kobalah of sale, which contained the boundaries of all 134 beegahs, it distinctly goes to show that he (plaintiff) entered into a collusion with his vendor. Otherwise, none are so foolish as to purchase a piece of land which is not properly defined, and of which no boundary is given, on paying its consideration."

Thus it appears that the learned Subordinate Judge, on what we must term a complete misapprehension of the evidence, allowed himself to be led to the conclusion that the plaintiff was setting up an entirely fraudulent case.

Then, it further appears from his judgment that he sent for and gave consideration to some documents which were not put in evidence before the first Court. He has not given any reason for this step; and from the remarks which he makes with regard to the nature of the evidence afforded by these documents, it hardly appears that it is directly relevant to the issue which he had to try. At any rate, it was incumbent upon him, under the provisions of the Civil Procedure Code, to state distinctly the reasons which caused him to send for this evidence in the appellate stage of the case. Inasmuch as he has not done so, we have no means of judging whether this evidence was properly receivable at that stage or not; and we have no other alternative but to direct that it be rejected and excluded from the evidence on the record.

The learned Subordinate Judge has made a further mistake as to the statements of the witnesses—a mistake of a very serious kind; for he says:—"Of the few witnesses examined by the plaintiff to prove possession, none have defined the boundaries of those 5 beegahs; though some of them declared themselves to be karendas (cultivators) of that land."

We have had the evidence of one witness—the patwaree—read to us, who, whatever be his veracity, certainly does speak distinctly to the plaintiff's vendor having been in possession of 5 beegahs of land specified by the very boundaries by which the plaintiff describes these 5 beegahs in the plaint. And the same witness ought to have led the Subordinate Judge to have seen his mistake with regard to the boundaries of 134 beegahs, because he speaks of those boundaries as boundaries quite distinct from the boundaries which he gives to the 5 beegahs.

A still more unfortunate error has been fallen into by the Subordinate Judge with regard to the pottahs and the receipts. He says:—"The pottahs of their cultivation (that is, the cultivations of certain witnesses) which they have filed clearly seem on the very sight to be fabricated; inasmuch as the reverse of the pottah, which is always handled by every one, looks clear, and the side which contains the writing, and which it is possible to keep clean, looks old and dirty. By my own experience I do not at all hesitate to call this pottah a fabrication. Similar is the case of the dakhilals. In short, I have no reliance upon the evidence of these witnesses."

It seems to us that this is not the proper way of treating evidence of this kind. Witnesses had sworn to the authenticity of these documents, and the Subordinate Judge ought not, simply from an inspection of them and in reliance upon his own experience in judging of such documents, to have come to the conclusion that they were fabrications, and that consequently the witnesses whose evidence made them out to be authentic documents had perjured themselves. Before coming to a conclusion which involved an accusation of such a serious character as this, the Judge ought to have looked very carefully indeed into the testimony of those persons, compared it so far as he was able with the other evidence in the case, and to have judged in that way whether the witnesses were such as could not be relied upon. It is exceedingly dangerous for the Judge of

an Appellate Court to come to the conclusion that a document is fabricated merely because it presents an appearance which in his judgment an authentic and real document would not be likely to have under the circumstances.

On the whole, it seems to us that the case has not been properly and carefully tried in the Court below, and it must therefore be remanded.

The decision of the Subordinate Judge must be reversed, and the case remanded to the Lower Appellate Court for re-trial. But inasmuch as the Subordinate Judge has shown that he has taken a very strong view of the conduct of the parties, and therefore is not likely to re-consider the evidence with entire freedom from the view which he has already taken, we think that it will best serve the ends of justice if we direct the case to be removed from the Court of the Subordinate Judge to the Court of the Judge for re-trial.

Costs to abide the event.

The 19th September 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

*Proceedings under Act XXVII of 1860—
Issues—Evidence.*

Case No. 210 of 1873.

*Miscellaneous Appeal from an order passed
by the Officiating Judge of Sarun, dated
the 2nd May 1873.*

Mussamut Anundee Kooer (Objector)
Appellant,

versus

Bachoo Singh (Petitioner) *Opposite Party.*

Mr. J. T. Woodroffe and Baboo Romesh
Chunder Mitter for Appellant.

Mr. R. T. Allan, Moonshee Mahomed
Yusoof, and Baboo Judoonath Sahoy for
Opposite Party.

Although no title is judicially determined as the result of an inquiry under Act XXVII of 1860, yet the Court is bound under the Act to give the certificate to the person who makes out a title, and for that purpose, when parties are not agreed as to the facts, to try the issues in the ordinary way by the aid of evidence.

Phear, J. — It appears to us that the Judge has not sufficiently enquired into the

matter of these petitions. Section 3 of Act XXVII of 1860 lays down the procedure which ought to be followed in cases of this kind. It enacts that "the applicant in his petition shall set forth his title. The Court shall issue notice of application, inviting claimants and fixing a day for hearing the petition, and upon the appointed day, or as soon after as may be convenient, shall determine the right to the certificate and grant the same accordingly."

In the present case, two petitions were preferred to the Judge; and the titles respectively set forth in them were antagonistic: it therefore became incumbent upon the Judge to enquire which title was made out, and for that purpose to give the petitioners opportunity of adducing before him such evidence as was relevant to the question of title as set out in their petitions. The Judge himself says:—"The point in issue in both cases is substantially the same. It is this, whether Bachoo was ijmalee with Sree Kishen and Jugul Kishore up to the date of their respective deaths, or did the three brothers separate from each other in 1272, and remain so separated up to these dates."

This issue is eminently an issue of fact; and unless the parties were agreed, it seems to be impossible for a Court to come to a judicial decision upon it, unless it takes into consideration the evidence which the parties may bring forward each in support of his own title. No doubt the Judge is quite right in thinking that the proceedings initiated for the purpose of obtaining a certificate under this Act are not civil proceedings in this qualified sense,—namely, that no title is judicially determined between the parties as the result of the enquiry:—still the Court is bound under the Act to give the certificate to the person who makes out a title; and it is for that purpose necessary, when parties are not agreed upon the facts, that the Judge should try the issues in the ordinary way by the aid of the evidence put forward by the parties.

It appears that both the petitioners desired to put before the Court a very considerable body of evidence, partly documentary and partly the oral testimony of witnesses whom they had brought before the Court for the purpose; but the Judge disregarded the witnesses. We understand he would not permit any of them to be called, and none of the documentary evidence was therefore properly proved. So that, for that reason, if for no other, the Judge was without evidence before him upon which he could judicially

arrive at any opinion upon the disputed issue or issues of fact.

On the whole, as has already been said, it seems that the enquiry has been insufficient: in truth, there has been no proper enquiry at all, and therefore the order of the Judge must be set aside, and the petitions referred back to him in order that he may hear them and determine the right of the petitioners under the provisions of Section 3 Act XXVII of 1860.

Costs in this Court to abide the event of the further enquiry.

The 19th September 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Decree—Interest—Execution.

Case No. 214 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tirhoot, dated the 7th June 1873.

Jewun Lall Mahtah and others (Decree-holders) *Appellants,*

versus

Doorga Dutt Singh (one of the Judgment-debtors) *Respondent.*

Baboo Nil Madhub Bose for Appellants.

Mr. J. H. A. Branson and Baboos Bhowanee Churn Dutt and Aubinash Chunder Banerjee for Respondent.

Where a decree contains no order for interest, the Court executing it has no power to give interest: nor can such a decree be reformed by means of a miscellaneous appeal.

Phear, J.—We think the Court below is right in the construction which he has put upon the decree. Very plainly, there is no order for interest upon the amount claimed, and consequently the Court which is charged with the execution of the decree has no power to give interest.

The learned pleader who has appeared for the appellant has referred to the judgment which gave the reasons for passing the decree; and it is possible that his clients, when they obtained the decree, had a right to insist that interest should have been awarded by it. But they appear to have been satisfied with the decree in the form which it at present takes. They have only

themselves to thank if the omission of interest is contrary to the intention of the Court. We cannot now at this stage of the proceedings, and upon this appeal, do anything for the purpose of reforming the decree. Indeed, we have no ground before us upon which we could rightly order any rectification to be made. This being the state of the case, we dismiss the appeal; but we think that under the circumstances each party should pay his own costs of this appeal.

The 19th September 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Act XXXV of 1858—Manager—De lunatico inquirendo.

Case No. 253 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Bhaugulpore, dated the 5th July 1873.

Mussamat Gireejabutty Kooeree (Opposite Party) *Appellant,*

versus

Monjee Lall (Petitioner) *Respondent.*

Messrs. R. E. Twidale and C. Gregory and Baboo Chunder Madhub Ghose for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

It is only when a man has been adjudged a lunatic as the result of proceedings and an enquiry held in due course of law, that the Court obtains the authority to appoint a manager of his estate.

Phear, J.—We think that the order of the Judge was made *ultra vires*. The Judge says:—"It is admitted that the lady's husband is a lunatic," and upon that ground he seems to think that he has authority to appoint a manager. But that is not so. The lunatic himself is the person most intimately concerned in a matter of this kind, and it is only when he has been adjudged a lunatic as the result of proceedings and an enquiry held in due course of law, that the Court obtains the authority to appoint a manager of his estate. It would certainly be very startling if the law were otherwise. If a man's nearest relations could, by coming into Court and representing that in their opinion

he was a lunatic, get the Court to appoint a manager of his estate, the consequences to the public might be very serious indeed.

It appears to be very plain that in this case no proceedings such as those prescribed by Act XXXV of 1858 have been duly carried out to a final result, and there has been no formal adjudication of lunacy: consequently the order of the Judge is void as having been made without jurisdiction. It is, therefore, not necessary for us to enquire on this appeal whether the right person has been appointed manager or not. We direct that the Judge's order be set aside, and we think that each party before us ought to bear his own costs both here and in the Court below.

The 20th September 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

*Act XXIII of 1861 s. 27—Special Appeal—
Application under s. 15 of the Charter Act.*

Case No. 201 of 1873.

*Miscellaneous Appeal from an order passed
by the Judge of Shahabad, dated the
31st March 1873, reversing an order of
the Moonsiff of Arrah, dated the 14th
February 1873.*

Soonut Dass (Decree-holder) *Appellant,*
versus

Bhoban Lall and others (Judgment-debtors)
Respondents.

*Moonshee Mahomed Yusoof for Appellant.
Baboos Nil Madhub Sen and Hureehur
Nath for Respondents.*

A special appeal having been successfully objected to under Act XXIII of 1861 s. 27, the Court refused to treat the petition of appeal as if it were an application to the Court to exercise its extraordinary powers, but simply rejected the appeal without prejudice to appellant's right to make an application in proper form to have the Judge's order quashed as having been made without jurisdiction.

Phear, J.—We think that the preliminary objection to this appeal must prevail. There is no doubt that this is a case in which a special appeal to this Court is forbidden by Section 27 Act XXIII of 1861. We have, however, been asked to treat this petition of appeal as if it were an application to the Court to exercise its extraordinary powers, and to quash the order of the Judge on the ground that it was made without jurisdiction.

We have heard the argument on both sides with regard to this application as so treated. We have, however, come to the conclusion that, under the circumstances of this case, we ought to simply reject the appeal without prejudice to the appellant's right to make an application at some future time in proper form to have the Judge's judgment quashed. This particular question has arisen somewhat unexpectedly in this case, and neither party is thoroughly well prepared to discuss it; and it is manifestly one of no little difficulty and nicety. On the other hand, we have had brought to our notice a decision of the High Court of the North-Western Provinces,* which undoubtedly does uphold the jurisdiction of the Judge in a case like the present; though it is right to remark that the different enactments bearing upon the point are not in any way discussed by the High Court in their reported judgment.

On the whole, we think that the better course is that which has already been mentioned, namely, that this petition of appeal be rejected without prejudice to any application that may hereafter be made by the petitioner to have the Judge's order quashed.

The respondent in this case must have his costs, one gold-mohur being allowed for pleader's fees.

The 20th September 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Right of Occupancy—Transfer.

Case No. 1651 of 1872.

*Special Appeal from a decision passed by
the Subordinate Judge of Bhaugulpore,
dated the 26th July 1872, reversing a
decision of the Moonsiff of Monghyr,
dated the 7th June 1872.*

Bootee Singh and others (Plaintiffs)
Appellants,
versus

Moorut Singh and others (Defendants)
Respondents.

*Mr. R. E. Twidale and Baboo Mohinee
Mohun Roy for Appellants.*

*Mr. C. Gregory and Baboo Nil Madhub
Sen for Respondents.*

Query.—Is a bare right of occupancy under the rent-law transferable irrespective of the will of the zemindar?

* 3 N. W. P. Rep. 168.

Phear, J.—We think that the judgment of the Subordinate Judge is not entirely right upon the facts at which that Court arrived. Both the first Court and the Lower Appellate Court were agreed in thinking that the defendants Nos. 1 and 2 had failed in proving that they had an old *gorabundee* right to their jote; but the Lower Appellate Court, upon the evidence which it refers to, was of opinion that these defendants had gained a right of occupancy under the rent-law, and that such a right of occupancy was in their village or in their neighbourhood recognized as a transferable right, irrespective of the will of the zemindar. It seems to us more than doubtful whether any evidence could establish that a bare right of occupancy under the Act was transferable irrespective of the will of the zemindar. But, however this may be, we are quite clear that the evidence upon which the Subordinate Judge bases his opinion is insufficient for that purpose. All the transfers to which he refers are in terms transfers of a *gorabundee* right; therefore the subject which was transferred by them was something very different from the bare occupancy right to this land, which was all that the Subordinate Judge found to be the right of the first two defendants. This being so, we think that the Subordinate Judge was wrong in holding that the transfer of the land in question from the first two defendants to the defendants of the second party was valid against the zemindar.

At the same time it appears to us that the zemindar has not in this case the right to eject the second defendants. These defendants have taken a small portion only of the jote which the first defendants held, and the first defendants are still remaining in possession of that part of their jote of which they did not affect to make a transfer to the second defendants: also they have not in any sense abandoned the part of the jote which they have transferred to the second defendants; for, we were told at the hearing of this case by the learned pleader who appeared for them that they were ready to take back or re-assume possession of these very lands. Their responsibility to their zemindar for the rent remains as it was before the pretended transfer, and they are willing to take back the land. Under these circumstances, the plaintiff has no right to eject all the defendants: he could at the most eject the defendants of the second party for the purpose of putting in the defendants of the first party, which really is no ejectment at all. He has no right himself

to recover possession. We think that the proper decree will be a declaration in favour of the plaintiff that the tenure of the defendants Nos. 1 and 2 was not a *gorabundee* tenure transferable irrespective of the will of the zemindar, and that the *kobalah* which these defendants granted to the defendants of the second party is void and inoperative as regards the plaintiff. Further, we think that there should be an injunction against the defendants of the second party alone, restraining them from setting up against the plaintiff any title to this land as a jote based upon the footing of that *kobalah*.

We therefore reverse the decision of the Lower Appellate Court, and instead thereof make a declaratory order in terms which have just been mentioned. We also think that the appellant must have his costs of this appeal, and that each party should pay its own costs in the Courts below.

The 17th November 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Enhancement of Rent—Separate Notices.

Case No. 181 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 28th September 1872, affirming a decision of the Moonsiff of Monghyr, dated the 30th December 1871.

J. D. McGiveron (Plaintiff) Appellant,

versus

Duriaw Chowdhry and another (Defendants) Respondents.

Baboo Amarendra Nath Chatterjee for Appellant.

Baboo Boodh Sen Singh for Respondents.

A notice of enhancement of rent need not be on a separate piece of paper for each holding. All that is required is that it shall be so distinct for each that the tenant may be able to distinguish those in respect of which he does not object to the enhanced rate from others in respect of which he declines to pay it.

Couch, C.J. — THE notice in this case states the grounds upon which the enhanced rent is demanded, and then specifies the area of the different plots of land held by the defendant, the rent paid for each plot, and the amount of the enhanced rent. It does not appear that the defendant did not from that notice receive sufficient information to enable him to know what different plots of land were intended. By putting together the quantity specified for each plot and the rent payable for each, he might know which was meant. And it would seem from his written statement that he did.

The Judge has held that this was a bad notice. He says that "the defendant was entitled to receive a separate notice for each holding, apprizing him of the enhanced rate sought on each; instead of this, he received the one notice in which both classes of holdings are mentioned."

The defendant did in fact receive a notice which informed him of the rent which was asked for each piece of land. The Judge seems to have thought that because the notices were in one paper it was a bad notice. But it is not necessary that notice should be given on a separate piece of paper for each holding. All that is required is that the notice shall be so distinct as to each holding that the tenant may be able to say, I have no objection to pay the rent demanded for this piece of land, but I decline to pay the rent demanded for the other. If the paper gives him that information, it is sufficient. It is not requisite that anything more should be done, and that twenty or thirty papers should be given when one is sufficient.

The case in the VIII Weekly Reporter* is no authority for what the Judge has decided. We find it there stated that the separate existence of the holdings was entirely ignored, and the ryot was called upon to pay a consolidated sum of 39 rupees 12 annas and 8 gundahs upon an aggregate area of 32 beegahs 17 cottahs and 2 chittacks of land alleged to be in his possession. Such a notice as that would no doubt be bad. It is different from the one given in this case.

We think the decree of the Judge was wrong and it must be reversed, and the suit be remanded to him for re-trial upon the merits. The Judge in trying it will decide whether the plaintiff is right in his demand of the enhanced rent for the whole of the property or for a part of it, and make a decree accordingly.

The 17th November 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Admissions.

Case No. 498 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 18th December 1872, reversing a decision of the Sudder Moonsiff of that district, dated the 10th April 1872.

Lutchoomun Lall and others (Defendants)

Appellants,

versus

Khurgo Ram (Plaintiff) *Respondent.*

Baboo Nil Madhub Sen for Appellants.

No one for Respondent.

In a suit for a share of certain property where the defence was rested upon a mokurree deed under which the defendants alleged that their predecessor and themselves had had possession, the Lower Appellate Court gave effect to certain supposed admissions without noticing matters which had been noticed in the judgment of the first Court as having occurred subsequently to the admissions and rendered them nugatory.

Held, that the Lower Appellate Court's decision was erroneous and ought to be reversed.

Couch, C.J. — THE plaintiff's claim was for an 8 annas' share in certain property, and the defence was rested upon a mokurree deed under which the defendants alleged that their predecessor and themselves had had possession, and the issues in fact framed by the Moonsiff were, whether or not the mokurree deed alleged by the defendant is *bonâ fide*; whether or not the defendant's predecessor and the defendant held possession by virtue of the aforesaid deed; whether or not the plaintiff was in possession before the date of dispossession; and whether the plaintiff was dispossessed on the

date alleged by him, and was entitled to recover possession.

The Moonsiff dismissed the suit, and the Subordinate Judge on appeal held that the plaintiff was entitled, not to an 8 annas share, as he claimed, but to a 6 annas, founding his decision upon what he said were certain admissions by the ancestor of the defendants appearing in a decision of a Moonsiff of the 27th of September 1847, and also in a decision of the 10th of February 1853. These admissions, the Subordinate Judge says, show that Chirunjibee, the defendant's ancestor, admitted that the mokururee was determined to the extent of 6 annas, the share of Khurgoo Ram, and to extent of 10 annas, the share of Chirunjibee.

The Subordinate Judge takes no notice of matters which are noticed in the judgment of the Moonsiff, and which occurred after these supposed admissions by the defendant's ancestor. These were that in a suit between the same parties, in which the plaintiff sought to recover possession of the share that he claimed, the mokururee deed was set up by the defendants as an answer to the suit, and it was found to be a genuine deed. The case went through various Courts. It was remanded once, and finally the right of the defendants in the mokururee appears to have been declared by the judgment of the High Court confirming the decisions of the Lower Courts.

Certainly these proceedings ought to prevail against statements of admissions made in the decisions which have been referred to by the Subordinate Judge. We cannot understand how he came to take no notice of them. It appears to us that his decision is erroneous, that he has given an effect to the admissions which ought not to have been given to them. Considering what had subsequently occurred between these parties, the defendants ought to succeed. The judgment of the Moonsiff was a right one, and ought to be restored.

We think it would not be right for us to remand the case for the Subordinate Judge to pass a fresh judgment. We are at liberty to make the order ourselves. If we were to send the case back, and the Subordinate Judge were to give the same judgment as before, we should be of opinion that it ought to be reversed again by this Court. We must save the parties the expense of any further litigation, if we have power to do so.

The decree of the Subordinate Judge will be reversed with costs, and the decree of the Moonsiff restored.

The 17th November 1873.

Present:

The Hon'ble Louis S. Jackson and
Dwarkanath Mitter, *Judges.*

*Refusal to execute Kobalah—Compensation—
Contract Act s. 74.*

Case No 207 of 1873.

*Miscellaneous Appeal from an order passed
by the Officiating Judge of the 24-Per-
gunnahs, dated the 21st March 1873,
affirming an order of the Second Subor-
dinate Judge of that district, dated the
16th December 1872.*

Fukeer Ahmed (Decree-holder)
Appellant,

versus

Issur Chunder Doss and another (Judgment-
debtors) *Respondents.*

*Mr. Ameer Ali and Moonshee Abdool
Baree for Appellant.*

Baboo Gopal Lall Mitter for Respondents.

Where a kobalah is not executed within the stipulated date, an intending purchaser is not entitled to compensation under the Contract Act s. 74, unless he can show that he tendered the purchase-money, and the bond, together with a draft of the kobalah, to the opposite party, who then refused to execute.

Jackson, J.—We think the decisions of the Courts below are correct and equitable. Under the circumstances of this case, if it was the intention of the special appellant to insist upon compensation as provided in Section 74 of the Contract Act, he was bound, in the first instance, to do all that was required of him. He ought to have tendered the purchase-money and the bond, together with a draft of the kobalah, to the opposite party; and if then the opposite party had refused to execute the kobalah, probably their refusal might have afforded him a ground to claim compensation to a reasonable amount. But he did not do so. He seems to have paid the money into Court, and it is not shown that the respondents received any notice of such payment, nor is it suggested that any kobalah was tendered to them for execution. Besides that, the special appellant appears not to have regarded the omission to execute the kobalah within the month as a breach of the contract, because he applied to the Court, and the Court assisted him in having the kobalah enforced, which was done two months after the stipulated date. Under the circumstances, it seems to us that the special appellant is entitled to no compensation at all. The special appeal is therefore dismissed with costs.

The 19th November 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

Misjoinder—Splitting of Causes.

Case No. 1911 of 1872.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 27th September 1872, affirming a decision of the Sudder Moonsiff of that district, dated the 17th June 1872.

Ram Coomar Mytee (Plaintiff) *Appellant,*

versus

Koomar Narain Doss and others (Defendants)
Respondents.

Baboo Bhyrub Chunder Banerjee
for Appellant.

Baboos Ashootosh Dhur and Romesh
Chunder Bose for Respondents.

It is not necessary to dismiss a suit in which claims upon different causes of action, and against different persons, have been joined together. It ought to be tried so far as relates to the joint claim against all the defendants, the Court excluding from its consideration any claim not common against all.

Markby, J.—If the contracts upon which the questions to be decided in this suit mainly depend had been upon the record, it is possible that we might have disposed of this case; but as they are not here, it is impossible for us to do so, and the case must be decided elsewhere. As the judgment of the Lower Appellate Court now stands, the suit has been entirely dismissed both as regards the claim against the defendant No. 1 alone, and as regards the claim against the defendant No. 1 jointly with the defendants Nos. 2 and 3. Now we have no doubt that, in point of law, the Lower Appellate Court was right in holding that these two claims were not only upon different causes of action, but against different parties, and therefore they were wrongly joined in the same suit; but, holding that, it was not necessary to dismiss the whole suit. The Lower Appellate Court might and ought, as we think, to have tried the suit so far as it related to the joint claim against the defendants Nos. 1, 2, and 3, excluding entirely from its consideration the claim against the defendant No. 1 alone. We, therefore, remand the case to the Lower Appellate Court to try the appeal upon all the points considered by the Moonsiff, as well as any other points which may properly arise

upon so much of the case as relates to the claim which is made against the defendants Nos. 1, 2, and 3 jointly. As to the claim against the defendant No. 1, the plaintiff must bring a fresh suit, which we reserve him the liberty to do. But inasmuch as the judgment of the Lower Appellate Court in point of law was right, and it was the plaintiff's own fault that the more advantageous course now suggested by us was not suggested by him, and the leave obtained which he has now obtained, he must pay all the costs up to this time.

The 20th November 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie,
Judges.

Plaint—Right of Suit—Grounds of Action.

Case No. 1954 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 12th September 1872, affirming a decision of the Moonsiff of Russoolgunge, dated the 3rd June 1872.

Premanund Gossamee (Plaintiff) *Appellant,*

versus

Ram Churn Deb and another (Defendants)
Respondents.

Baboo Grish Chunder Ghose for Appellant.

Baboo Rajendro Nath Bose for
Respondents.

A plaintiff who omits to include in his suit all the grounds on which it can be based, cannot be allowed to bring a second suit on grounds which existed at the time the first suit was brought.

Kemp, J.—This special appeal must be dismissed with costs. The plaintiff, special appellant, sued for confirmation of possession and title to property which he alleged he purchased in 1267 from Purnessuree in the name of his disciple Goluck Chunder. It is admitted that subsequent to this benamsee purchase, the plaintiff took a conveyance from the benamdar Goluck Chunder in the name of his servant Gokool. It is also clear, and this has been found as a fact by the Subordinate Judge, that the second benamdar Gokool brought a suit against the first benamdar, from whom the first plaintiff had taken a conveyance, and that suit was unsuccessful. In that suit, the question and the only question which was tried as between Gokool

representing the plaintiff and Goluck Chunder, was whether there was any collusion between Goluck and Ram Churn, and the finding of the Court on that question was that there was no collusion proved. The plaintiff failing in the case which he put forward on the part of Gokool, in which suit the plaintiff chose to limit his title, has now brought the present suit for the same property and on the same cause of action, alleging a purchase from Purmessuree. We think that the plaintiff was bound in his former suit, to include in it all the grounds which then existed on which that suit could be based, and the second suit on grounds which existed at the time the first suit was brought cannot be allowed. We may add also that the dismissal of the suit in the Lower Courts has been a proper one, looking to the fraud committed by the plaintiff in this case. We therefore confirm the decision of the Court below, and dismiss the special appeal with costs.

The 21st November 1873.

Present :

The Hon'ble J. B. Phear, Judge.

Money Decree—Execution-sale.

Case No. 699 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 24th December 1872, affirming a decision of the Moonsiff of that district, dated the 7th September 1872.

Muhammed Ekbal Hossein and others
(Plaintiffs) Appellants.

versus

Ram Kishen Doss (Defendant) Respondent.

Moonshee Mahomed Yusoff for Appellants.

Baboo Chunder Madhub Ghose and
Bhowanee Churn Dutt for Respondent.

A sale held in satisfaction of a decree for costs made against certain parties personally, can lawfully only pass

property belonging to those parties; it cannot pass property inherited by others as co-heirs with them.

Phear, J.—THE plaintiffs in this case are (I believe I may say) admittedly entitled by inheritance to a 2 annas 8 pie share of the property for which they sue, unless the defendant on the 20th January 1863 obtained by a purchase made at a sale, which was held in execution of a decree against Mussamut Sooburno and Teelokee Lall, the entire 4 annas share which belonged at that time to Ram Lall, Mussamut Sooburno's husband, then a lunatic. The Lower Appellate Court appears to have been of opinion that the execution-sale held on the date I have mentioned had the effect of passing the whole of the lunatic's interest to the purchaser. But it appears to me that the Subordinate Judge committed error in taking this view. The sale in execution was had merely for the purpose of satisfying a decree for costs; and that decree, so far as I can understand the terms of it as explained to me by the learned Counsel who have appeared before me in this case, was a personal decree against Mussamut Sooburno and Teelokee Lall. The sale was not a sale ordered by the decree itself with the view to carrying out or in order to effect the purposes of any deed made by Ram Lall or any one competent to bind Ram Lall. It was, as I have already mentioned, simply a sale held in satisfaction of the decree for costs which the Court had made against Sooburno and Teelokee Lall *personally*. That sale, therefore, whether the words of the sale certificate were more comprehensive or not, could lawfully only pass property belonging to Teelokee Lall and Sooburno. And I believe that the sale certificate did not profess to extend further than this. But the whole of the property in question, which at that time belonged to Sooburno and Teelokee Lall, or has since come to belong to either of them, was at the most a 4 annas 4 pie share, which Teelokee Lall subsequently inherited from his father. This sale therefore, as it seems to me, could not have the effect of passing to the defendants the 2 annas 8 pie share of Ram Lall's property which the plaintiffs on their part at the same time inherited. Consequently, the plaintiffs are entitled to a decree. It is not urged that there is any bar in the shape of lapse of time or otherwise to the claim which they now make, and therefore I am of opinion that the decrees of both the Courts should be reversed, and a decree given to the plaintiff for a 2 annas 8 pie share, with costs in all the Courts.

The 25th November 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Mortgage Bond—Dispossession—Joint Family—
Tacit Consent.*

*Reference to the High Court by the Moon-
siff exercising the powers of a Judge of
the Small Cause Court at Raneeegunge,
dated the 9th September 1873.*

Gyaram Chuckerbutty, *Plaintiff,*

versus

Buroda Dabee, *Defendant.*

Case.—Plaintiff sues to recover money due on a mortgage bond alleged to have been executed by defendant's late husband S, and by his brother J who however is relieved by plaintiff from the debt. The conditions of the bond are that plaintiff's father should possess the mortgaged property in consideration of interest only accruing upon the principal sum lent, and that the mortgagor should take back the property whenever he should pay the principal sum to the mortgagee. The present suit is brought by reason of plaintiff having been dispossessed of the property by the shareholder brothers J and A.

Held, that the money lent is recoverable notwithstanding there is no express condition in the bond to the effect that it would be recoverable in the event of dispossession by a third party. But as the money is found to have been borrowed by defendant's husband on

behalf of the family with the tacit consent of the other members, the plaintiff can recover from the present defendant only her share of the debt.

Case.—PLAINTIFF brings this suit for recovery of money due on a mortgage bond, dated 4th Falgoon 1273, alleged to have been executed by the defendant's late husband Sreeram Ghossal on taking the principal sum of Rs. 49-12 from plaintiff's father. The bond purports to have been executed by the late Sreeram Ghossal, as well as by his brother Janokee Ghossal, but plaintiff relieves Janokee from the debt, stating that Janokee was not present at the time of the execution of the bond, but that "Sreeram being his brother and living in the same mess with him, and who did use to do every act for him, signed his name." Plaintiff prays to recover the money from the mortgaged property and other properties of the late Sreeram Ghossal. Though this prayer is made, yet I put the case in the Small Cause Court file as the money claimed is below Rs. 50, and as the boundaries of the land are not given in the plaint, and as there is no condition in the bond that the money lent should be recovered from the mortgaged property. The conditions of the bond are these, viz., that plaintiff's father should possess the mortgaged property in consideration of interest only accruing upon the principal sum lent, and that the mortgagor should take back the property whenever he should pay the principal sum to the mortgagee. Plaintiff says that the late Sreeram, at the consent of his shareholder brothers Janokee Ghossal and Ajoodhya Ghossal, mortgaged the whole property, and that hence his father and since his death, he himself was in possession of it till Assar 1280, when he, plaintiff, was dispossessed from it by the shareholders Janokee and Ajoodhya, and that hence he sues for recovery of the principal sum, as the cause of action accrued from Assar last.

Defendant denies execution of the bond by her late husband, and also says that as there is no condition in the bond that if plaintiff be dispossessed from the land that he could be able to recover the money lent, plaintiff has therefore no cause of action to sue for the money. Secondly, that as plaintiff or his father took the property knowing it to belong, not only to her late husband

Sreeram, but also to his two brothers Ajoodhya and Janokee, the mortgage of the property should be considered to be of one-third share only, for liquidation of interest, and that as it is admitted by plaintiff that she did not dispossess him from that share, plaintiff therefore cannot recover the money, as he has no cause of action against her, and as there is no condition in the bond that plaintiff would be able to recover the money in case he be dispossessed by a third party. She further says that the suit is barred by limitation as plaintiff did not bring the suit within three years from the date of the execution of the bond.

The points for trial in the case are :—

1. Whether the bond was executed by defendant's late husband Sreeram?
2. Whether plaintiff can recover the money lent under the mortgage bond from defendant, when there is no condition in the bond that plaintiff would be able to recover the money in case he is dispossessed from the land mortgaged by a third party?
3. Whether the suit is barred by limitation?

I find from evidence adduced by plaintiff that the bond was wholly written by Sreeram Ghossal, who signed his name on it as well as the name of his brother Janokee. Ajoodhya Ghossal attests the hand-writing of Sreeram in the bond. There is no doubt, therefore, that the bond was executed by Sreeram Ghossal. Though there is no proof given of the direct consent being given by Janokee and Ajoodhya to their brother Sreeram to mortgage the property, I find that they tacitly consented to the mortgage, when they allowed plaintiff to possess the whole property, including their share, from the time of the execution of the bond up to last Assar 1280, that is, for the last five or six years, and when I find that they and the defendant are still living in joint mess and commensality. Thus I find from admission of Ajoodhya on oath that plaintiff held the whole property during that time, and that he dispossessed him from the said property in Assar last. It is here argued by defendant's pleader that if by such tacit consent of Ajoodhya and Janokee, the whole property be deemed to have been mortgaged, then plaintiff can only sue for recovery of the said property from them, viz., from those third parties, but cannot sue defendant for the money, as she has neither dispossessed plaintiff from her own share of the land, nor

from the shares of Ajoodhya and Janokee; and if the mortgage be taken to be of one-third share of the property only, even then plaintiff cannot sue for recovery of the money, as defendant is admitted to have not dispossessed him from that share, and as plaintiff suffered no loss as to interest, as he knowingly took that share for liquidation of interest. With respect to these objections I say that when I find Sreeram Ghossal to have mortgaged the whole property, including shares of Janokee and Ajoodhya for liquidation of interest upon the principal sum lent, I think plaintiff is entitled to recover the money lent when he is dispossessed from the property, whether the dispossession is made by a third party or not. I think it was on the condition that the interest accruing upon the principal sum should be liquidated from the mortgaged property that the said property was mortgaged, and when plaintiff suffers loss as to interest upon his being dispossessed from the said property, he is entitled to recover the money, no matter whether the dispossession is made by defendant herself or by others. I think plaintiff in such a case has the option either to sue the persons by whom he is dispossessed for recovery of possession to the land, or to sue the person to whom the money was lent for recovery of the money, even though there is no condition in the agreement that plaintiff will be able to recover the money in case he be dispossessed from the land. I think it would be inequitable if I hold otherwise in this case.

The question of limitation raised does not apply, inasmuch as plaintiff's cause of action must be said to have accrued from the date of dispossession. The case is therefore decreed with costs. The sum so adjudged shall be recovered from any property which the late Sreeram Ghossal left, with interest at 6 per cent. per year from date of decree to date of payment. I pass the decree contingent upon the orders of the Hon'ble High Court.

The question upon which I solicit the Hon'ble High Court's opinion is whether plaintiff can recover the money lent under the said mortgaged bond from defendant, when there is no condition in the bond that plaintiff would be able to recover the money in case he is dispossessed from the land mortgaged by a third party.

As this is a case turning upon the question of the construction of a document, I therefore refer it to the Hon'ble High Court.

The judgment of the High Court was delivered as follows by—

Markby, J.—It appears to us that the money lent is recoverable notwithstanding that there is no express condition to that effect in the bond; but the Small Cause Court Judge finds that the money was borrowed by the defendant's husband on behalf of the family, with the tacit consent of the other members of the family. The plaintiff can, therefore, recover from the present defendant only her share of the debt, which would appear to be one-third. The Small Cause Court Judge will, under Section 26 of the Act, dispose of the case in conformity with this decision.

The 27th November 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie,
Judges.

Possessory Suit—Limitation—Issues.

Case No. 855 of 1872.

Special Appeal from a decision passed by the Officiating Additional Subordinate Judge of Chittagong, dated the 29th February 1872, modifying a decision of the Moonsiff of Deang, dated the 26th July 1871.

Facz Bux and others (some of the Defendants) *Appellants,*

versus

Shaikh Meah Jan (Plaintiff) *Respondent.*

Mr. C. Gregory for Appellants.

Baboo Chunder Mathub Ghose for Respondent.

N M had two sons, N and R, by two wives. N had four sons; and R died leaving a son A, who had a son M. J, who is plaintiff in this suit. As representing the second branch of the family, M J sues the representatives of the first branch claiming a 4 annas share in the estate of their common ancestor, on the allegation that according to an agreement entered into between N and R and his father A, a 4 annas share devolved to his grandfather R, from whom is descended to plaintiff, and that he

was collecting rents in proportion to that share when he was dispossessed by defendants. Defendants denied the supposed arrangement on the ground that R predeceased his father N M, and alleged that a 2 annas share alone had devolved on plaintiff in right of inheritance from his mother, pleading, however, that plaintiff had never been in possession within twelve years. The Lower Appellate Court, modifying the decision of the first Court, gave plaintiff a decree to recover possession by means of a butwarrah.

The High Court remanded the case for a proper finding on the question of limitation with reference to the allegations of the plaintiff which had been lost sight of.

Kemp, J.—SOME of the defendants below are the special appellants in this case. Nasir Mahomed, the ancestor of both parties, had two sons, Nadir-uz-zummah and Rowshun-uz-zummah, by two wives. Nadir-uz-zummah had four sons; three sons by one wife, and the fourth son by another wife. The defendants are the sons of Nadir-uz-zummah; and amongst them Hedayat Ali, the son of the second wife of Nadir-uz-zummah, who is also a defendant, has been examined in this case. Nasir Mahomed's second son, by his wife Dowlut Bibee, Rowshun-uz-zummah, had a son Abool Hossein, whose son Shaikh Meah Jan is the plaintiff in this case.

The plaintiff, who represents the second branch of the family, sues the defendants who represent the first branch, claiming a 4 annas share in the estate of the aforesaid Nasir Mahomed, the common ancestor. The property claimed is divided into four classes: the principal property being a talook called Turuf Hadreess paying revenue to Government; the other properties being nowabad lands, tanks, lakheraj lands, and other properties of that description. The plaintiff asks for a partition, that is to say, that his 4 annas share may be divided off from the estate. It is important in this case to see on what allegations the plaintiff brought his suit. Now, on referring to the plaint, we find that the plaintiff states that, according to an agreement entered into between Nadir-uz-zummah and Rowshun-uz-zummah, the sons of the common ancestor Nasir Mahomed, and his father Abool Hossein, the date of which agreement he does not mention in his plaint, a 4 annas share devolved to his grandfather Rowshun-uz-zummah, from whom it was inherited by his father Abool Hossein, and after his death came to the plaintiff Meah Jan; that the plaintiff under this arrangement was collecting the rents of his share, namely, 4 annas, direct from the ryots in proportion to that share; that this enjoyment of the property lasted up to the year 1226 Muggee; when he was dispossessed by the defendants. His suit was brought in the year 1233

Muggee, or some years after the date of the alleged ouster.

The defendant's case is that the arrangement upon which the plaintiff relies as creating his title in a 4 annas share is false, and that it is false because Rowshun-uz-zummah, who is stated to have been a party to that arrangement, died in the life-time of his father. Then the defendants say that, inasmuch as Rowshun-uz-zummah died during the life-time of his father Nasir Mahomed, Aboul Hossein, the father of the plaintiff Meah Jan, would take nothing in the estate of Nasir Mahomed; but inasmuch as Nasir Mahomed's second wife, Dowlut Bibee, the mother of Rowshun-uz-zummah, was alive, she taking a 2 annas share in Nasir Mahomed's estate, that share and that share alone has devolved to the plaintiff in right of inheritance under the Mahomedan law. Then the defendants pleaded that the plaintiff has never been in possession within twelve years prior to suit, and therefore that his suit is barred. The Lower Appellate Court, the Subordinate Judge of Chittagong, lays down the following issues, namely, whether the plaintiff was entitled to institute in a Civil Court a suit for the butwarrah of a share of revenue-paying meahs? That question, however, is not now before us.

The second issue was whether any portion of the plaintiff's claim was barred by limitation?

Third.—What was the extent of the plaintiff's share, whether 2 annas or 4 annas, and what quantity of lands the plaintiff was entitled to recover possession of by means of a butwarrah?

On the second issue as to whether the suit is barred or not, the Subordinate Judge passes the following decision:—"That it would appear that the fact of the plaintiff being an ijmalee shareholder has not been denied by the defendants," and therefore the Subordinate Judge thinks that a suit brought by an ijmalee shareholder cannot be barred by limitation; further that it appears from the papers of the case that the plaintiff alleged that he held a 4 annas share of the land, while the defendants state that he held a 2 annas share only; that the plaintiff with reference to the Government revenue-paying estate has filed copies of certain mehal meelanee papers, and the Subordinate Judge comes to this extraordinary finding that inasmuch as the names of four persons were recorded as owners in these papers, namely, Meah Jan, Juleel Bux, Elahee Bux, and Ahmed Bux; therefore he was bound to hold that these four persons held equal shares,

that is to say, that because four names appear in a mehal meelanee paper, or on the towjee of the Collectorate, it must be presumed by the Court that these four parties hold equal shares in that property. Then with reference to the oral evidence, the remarks of the Subordinate Judge are certainly open to objection. He says this:—"I find that the defendant No. 1 is an influential man, and it is improbable that the witnesses examined on behalf of such an influential party should give evidence according to their conscience and without partiality; and then he says that because the plaintiff is a poor man, therefore it is highly creditable to the witnesses examined by him to have given evidence in support of the plaintiff's case. This is the whole of the judgment of the Subordinate Judge upon the oral evidence adduced by both parties. Then there is a finding as to the defendants not having been able to prove that a portion of the lands was set apart to meet the expenses of an ijmalee mosque, and it was also found that the defendants have not proved their alleged purchase of a tank. The Subordinate Judge, therefore, modifying the decision of the Court of first instance in so far as the first issue is concerned, namely, whether the plaintiff's suit, with reference to the butwarrah of the revenue-paying lands, can lie in the Civil Courts, gives the plaintiff a decree to recover possession by means of a butwarrah of the lands claimed in the suit with the exception of the lands paying revenue to Government.

In special appeal two grounds have been taken. The first ground is that there is no finding, although it was necessary to determine this point, as to whether Rowshun-uz-zummah predeceased his father Nasir Mahomed or not.

Then, with reference to the decision of the Court below on the issue in bar, the ground of special appeal is that the Court below should have determined whether the plaintiff was in possession of the 4 annas as claimed by him, and that the decision of the Lower Appellate Court in the words quoted in the vernacular, and on the ground of an ijmalee possession, is erroneous in law, and further that it is based upon the erroneous assumption of fact that it was not disputed that the plaintiff was an ijmalee holder, whereas the defence was a distinct denial of such fact.

Then there is a ground which it was hardly necessary to take, namely, that the Lower Appellate Court was wrong in holding that the parties named in the mehal meelanee papers must necessarily be held owners in

equal shares; this being obviously wrong. Then there is a further ground that the Court below was wrong in not referring to the written statement of the plaintiff filed many years ago in another suit before this dispute arose between the parties, namely, in the suit of 1867, in which the plaintiff admitted that his share in the estate was a 2 annas share only.

Then a ground as to the remarks of the Subordinate Judge which we have already alluded to with reference to the oral evidence; and lastly, it is said that the Court below was wrong in not examining certain witnesses with reference to the defendant's alleged purchase of the tank, whom the defendants had asked the first Court to examine unsuccessfully; this point forming one of the grounds of appeal to the Subordinate Judge.

The pleader for the respondent at the very opening of his argument was obliged to admit that the decision of the Subordinate Judge required the support of the decision of the first Court; he read the decision of the first Court, and it seemed to us that in the course of his argument he relied more upon that decision than upon the decision of the second Court.

Now, it is clear in this case that the plaintiff came into Court alleging an agreement between Nadir-uz-zummah, Rowshun-uz-zummah, and Abool Hossein as the foundation of his title in the 4 annas share which he claimed. It appears to us clear that, under the ordinary rules of succession under the Mahomedan law, the share of Rowshun-uz-zummah in the estate would be if not 8 annas, at all events more than 4 annas, and it would seem further as if the plaintiff being aware that his grandfather had predeceased Nasir Mahomed, and that this objection would be taken by the defendants, has been obliged to come into Court claiming a share smaller than he would be entitled to under the Mahomedan law as the representative of the second branch of the family, had not Rowshun-uz-zummah predeceased his father Nasir Mahomed. Both the Courts have found that the plaintiff has come into Court upon a title which he has not been able to establish, and we have no doubt that this finding is a correct finding and that the statement of the plaintiff as to the agreement is a false statement.

Then, with reference to the question of possession, a very important question in this case, which we think the Subordinate Judge has not properly dealt with, it is admitted that the defendants have been in possession

from the year 1226 Muggie; the suit being brought in 1233, or seven years after. The plaintiff came into Court distinctly alleging that he collected the rents of a 4 annas share direct from the ryots, and that that was the nature of his possession up to 1226 when he was dispossessed. Now the Lower Appellate Court has entirely lost sight of the allegations of the plaintiff, and has come to a finding that because the plaintiff has shown a joint possession, therefore the suit of the plaintiff cannot be barred by limitation. It is impossible to say what finding the Subordinate Judge would have come to upon the case as put by the plaintiff, inasmuch as he has not in any way considered that case. It may be that looking to the fact that the plaintiff has altogether failed to prove his allegation of an arrangement whereby he was entitled to a 4 annas share, as well as to the fact that there is no evidence as far as has been shown to us that the plaintiff did collect the rents from the ryots in proportion to a 4 annas share, that the Subordinate Judge might have come to a very different decision on the question of limitation. As already observed, he has not treated the point properly; he ought to have considered the allegations as made by the plaintiff in his plaint, and called upon the plaintiff to prove his possession in the way in which he alleges in his plaint within twelve years prior to suit. The case will, therefore, go back for a proper finding on the question of limitation with reference to the allegations in the plaint. The Subordinate Judge or other officer who may re-try this case, in coming to a finding on this point, must bear in mind that the plaintiff comes into Court alleging that his title to 4 annas arose under an agreement which was come to between Nadir-uz-zummah, Rowshun-uz-zummah, and Abool Hossein, and there must therefore be a finding as to whether Rowshun-uz-zummah predeceased Nasir Mahomed; if he did, the title upon which the plaintiff comes into Court, is a false title, and therefore his allegation that he has been in possession by receipt of rent from the ryots in proportion to a 4 annas share must also be open to great doubt as to whether it is not also false. Bearing these facts in mind, the Lower Appellate Court must come to a proper decision in the case. If the evidence on the record is not sufficient to enable the Lower Appellate Court to come to a proper finding on the question whether Rowshun-uz-zummah predeceased his father Nasir Mahomed, the Court will be at liberty to receive further evidence from both parties on this point. Costs to follow the result.

CRIMINAL RULINGS.

The 30th April 1873.

Present :

The Hon'ble J. B. Phear and F. A. Glover,
Judges.

*Procedure—High Court—Jury—Finding of
Facts—Acquittal—Act X of 1872 s. 263.*

*Reference to the High Court under Section
263 of the Code of Criminal Procedure
by the Officiating Sessions Judge of
Moorsshedabad.*

The Queen

versus

Koonjo Leth and others, Prisoners.

*Mr. M. Ghose and Baboo Luchhee Churn
Bose for all the prisoners except Koonjo
Leth.*

A Sessions Judge may, under s. 263 of the new Code of Criminal Procedure, submit to the High Court a case in which he disagrees with the jury in their finding of facts as well as a case in which he complains that the jury has not followed his directions as to the law: and the High Court in a case submitted under that Section may acquit the prisoner, if it so thinks fit, on the facts notwithstanding that the jury has found the prisoner guilty.

Phear, J.—In this case the prisoners have been convicted by a jury of the offence of dacoity, and some of them of having stolen property in their possession knowing it to be stolen.

The Judge who tried the case was dissatisfied with the verdict, and accordingly under the provisions of the new Criminal Procedure Code has submitted the case to this Court.

Upon considering the evidence, we find that the prisoners have been recognised by some of the witnesses who have given their testimony; that certain articles said to have been found in the possession of the prisoners have been identified also by some of the witnesses as articles which had been stolen from the prosecutor in the course of the dacoity; and there is further a confession made before the Magistrate by Koonjo Leth, one of the prisoners, jointly tried with the others. And in this confession every one of the other prisoners as well as Koonjo Leth

himself are mentioned as taking part in the dacoity. If there were nothing on the record serving to impeach these several heads of evidence, no doubt, the case against the prisoners would be very strong indeed. The Judge, however, has given reasons for thinking that the recognition of the prisoners by the witnesses cannot be depended upon; that the identification of stolen articles is untrustworthy; and that the confession of Koonjo Leth is not a true and real confession, but a confession which has been obtained by some contrivance of the Police, or in such a way at any rate as serves to render it altogether untrustworthy.

We concur with the Judge in this view. Indeed I may say for myself that if I had to judge of the facts merely by the testimony of the prosecutor and the other witnesses who have been called on the side of the prosecution, I should almost doubt whether there had been a real dacoity at all. The evidence of the prosecutor himself, Eshan Chunder, is in many parts inconsistent with itself and contradictory, and altogether presents a story which I find very difficult to believe to be the representation of a real occurrence in all its parts, and his statements of what happened on the night of the dacoity are, I think, in material points inconsistent with the statements of the other members of the family. One of the most important points to be considered in the case is furnished by the recognition by the members of the family of the different prisoners as persons who were present at the time of the committing of the dacoity. And it is of special importance, I think, to see at what time this recognition was first manifested. Eshan Chunder, the prosecutor, and the other members of the family all said that, immediately after the dacoits had disappeared, they spoke amongst themselves of the persons whom they had seen. And it was found that all the prisoners now under trial were mentioned at that time. This was in the middle of the night. Eshan Chunder and others of the witnesses also say that in consequence of their having recognised certain of the prisoners, one Roghoo Nath Roy, a neighbour, who had come up on hearing the *gulmal* was

sent off immediately by Eshan Chunder to a neighbouring village, Kantigram, to ascertain whether the suspicions entertained were true, and to give other informations which might lead to the apprehension of the dacoits. Eshan Chunder also says that two chowkeedars were immediately, *i.e.* in the night, sent off with the information to the thannah. He does not, however, venture to say that he told the chowkeedars the names of the dacoits who had been recognised. He says, upon being asked, that he does not remember whether he did so or not. Now, it turns out that the information of the dacoity did not reach the thannah till the afternoon of the next day, although the thannah was only eleven or twelve miles off. We have not got either of the chowkeedars before the Court as witnesses: we have not even got Roghoo Nath Roy brought forward as a witness. No reason whatever is assigned for the non-appearance of these persons as witnesses, and it is obvious that by the account of the prosecutor, their testimony would be most important as serving to lead us to the true state of the facts with regard to the recognition at the early period spoken to by the prosecutor and his relatives.

We have it further that the Sub-Inspector and the head constable did not reach the place until late in the evening of the next day. And the Sub-Inspector says that at that time the prosecutor was not even prepared to give him a list of the articles which had been stolen. No doubt the Sub-Inspector or the head constable does say that one chowkeedar brought the information to the thannah in the afternoon, and mentioned the names of the prisoners who have been tried as those who had been recognised by the prosecutor and the members of his family. This is the earliest period of time at which these names were disclosed according to the evidence before us; and I need hardly say that even that was a very great many hours after the occurrence had taken place and after ample time had elapsed for the prosecutor and his relatives to consult together, and to arrange as to the persons whom they should accuse. It is remarkable that the persons who have been accused are, I believe, with one exception, all persons who undoubtedly were at the time in some degree at feud with the prosecutor.

In addition to this, we observe that, according to the account both of Eshan Chunder, the prosecutor, and of Lallmoney, his sister, they had gone out immediately after the dacoits disappeared, roused the

village or part of it, met their neighbours, talked to them about the attack on them; yet not one of these neighbours is brought forward as a witness to give us any independent information as to what actually happened on that night. Lallmoney herself was, according to the account of the prosecutor, severely hurt by the dacoits in the house, struggled with them, succeeded in slipping her *kapra* off, and ran away, while the dacoits were actually in the house, ran away naked for shelter to the house of a neighbour, Troylukhyo Roy, and from him got some fresh clothes and then returned with him and others to the house. Yet, neither Troylukhyo Roy nor any of these men are called by the prosecution. Eshan Chunder is asked how this happens: and his answer is that all his neighbours take a hostile view of the matter of the dacoity against him, and therefore they refused to come forward and be his witnesses. But some of these persons have been produced as witnesses for the defence. And it is to these that I alluded when I said that if it was not for a certain body of evidence brought forward by the prisoners, I should have almost doubted whether there had been a dacoity at all.

I now come to the confession of Koonjo Leth. It is not very clear upon the record how it happened that Koonjo Leth was caught hold of and induced to confess before the Magistrate. But there are two matters to which he speaks in the confession, and with regard to which it seems to me that he certainly is not the witness of truth. He makes out that Sreemunto Mundul was with the dacoits as well as the other prisoners. Sreemunto Mundul was not recognised personally by any of the witnesses for the prosecution. But he admits that he was hurt on that night, and according to the prosecutor's witnesses, one of the dacoits was hurt by a brick being thrown at him from the top of the *baree*. Sreemunto Mundul's own account, supported by his witness, is to my mind perfectly clear and satisfactory. He with the other neighbours were roused by the noise; he went with them in the darkness towards the house, and in getting close to the house he was struck and hurt very severely by some one, whom he supposes to have been, as he calls it, one of the thieves. Now, whoever it was that struck him and hurt him, I think it quite clear from the evidence that he himself was not among the dacoits in the way in which Koonjo Leth says he was. He clearly enough went to the place of the

occurrence with others of his neighbours from his own house. It seems to me that, when Koonjo Leth says that Sreemunto was among the dacoits, he states that which is deliberately false. The case has been also sought to be brought home to Sreemunto through the identification of a bracelet, or *bajoo*, by the prosecutor and his sister, a bracelet which was found in Sreemunto's house. But I observe that the identification is made in the most general words. It does not appear that the characteristics of the bracelet were mentioned before it was found, though it bears many by which it might readily enough be identified. It was simply identified. It was simply identified thus, namely, by Eshan Chunder saying this also is mine; and by Lallmoney saying this article No. 15 belonged to my brother. But it happens that this bracelet was not found alone. A pair of bracelets was found—the one bracelet like the other, excepting that one, which I may call the second one, had for a portion of its circle the old beads apparently replaced by other beads of a smaller size than the old ones. And two persons, one of them being a silversmith, were called by the prisoner Sreemunto Mundul to identify this bracelet. The smith swears positively that the substitution of these smaller beads was done by himself, though he did not know whether for Sreemunto or some other member of his family. There is no doubt left upon my mind that this pair of bracelets both belonged to Sreemunto, and that the one bracelet which was identified by the prosecution was the companion of the other, and did not belong to the prosecutor.

I need not go further in detail into the evidence. I have stated enough I think to indicate the ground upon which we entirely concur with the Judge in thinking that the prisoners, excepting the first one, ought not to have been convicted upon the evidence which is on the record. The confession of Koonjo Leth, of course, could not have been legally used against the others at all excepting to such an extent as it was substantially corroborated by unimpeachable evidence *aliunde*. But so far from this being the case, as I have already mentioned, wherever the confession is really tested it is proved to be false.

I have, I believe, forgotten to mention, as I intended to do, the second ground upon which Koonjo Leth's confession appears to me to be most untrustworthy. The Sub-Inspector testifies that Koonjo Leth, when he

made his confession originally, stated that six other persons besides those whom he now mentions were members of the body of the dacoits. The confession, as made before the Magistrate, was confined in this particular to the prisoners who had been tried, and they are the persons, as I have already said, who were at the time of the committing of the dacoity at feud with the prosecutor. It is, therefore, to my mind obvious that, whatever was the original cause of this man's making any confession at all, the confession in the form in which it was taken and written down by the Magistrate is a prepared confession. It clearly does not tell *all* the facts which the prisoner had at one time expressed his readiness to tell, and it is adapted exactly to the circumstances of the prosecutor's case.

On the whole, then, we think, as I have already said, the prisoners ought not to have been convicted, and that in the interests of justice, all the prisoners, excepting the first prisoner, ought to be acquitted.

But a question of somewhat of a serious character has arisen as to our powers in this case to acquit. The case comes before us in consequence of the Judge having submitted it to this Court under the provisions of Section 263 of the new Criminal Procedure Code. According to that Section, "in cases tried by jury, * * * if the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court, and may either remand the prisoner to custody, or admit him to bail.

"The High Court shall deal with the case so submitted as with an appeal, but it may convict the accused person on the facts, and if it does so, shall pass such sentence as might have been passed by the Court of Session."

Do these words "*shall deal with the case so submitted as with an appeal*" mean that the case submitted shall be in all respects considered and situated as an appeal? If so, then it is an appeal, if not preferred by the prisoner, yet preferred on his behalf against a conviction of a jury, and Section 271 says:—"If the conviction was in a trial by jury, the appeal shall be admissible on a matter of law only."

And in the case before us the ground upon which the verdict of the jury is sought to be set aside is undoubtedly in substance a

matter of fact, and not a matter of law. The construction of these words to mean that the case submitted is to be considered essentially as an appeal, seems to be somewhat favored by the words which follow,—“but it may convict the accused person on the facts,”—because “*but*” seems to imply something in the way of opposition to, or inconsistency with, what would be the case of an appeal if that “*but*” was not there. And certainly if the appeal were preferred by the prisoner, it would be admissible on matter of law only. At the same time it is also obvious that in the case of an appeal preferred by the prisoner, the Appellate Court could never have any occasion to convict on the facts, because by the nature of the case such an appeal must always be an appeal against a conviction already arrived at in the Court below. And in the case of an appeal preferred on the part of the Crown against an acquittal (allowed for the first time by Section 272 of the new Code) it does not appear that there is any restriction imposed relative to the exercise of the discretion of the Appellate Court. Therefore, looking back again to the words of the Section which I have already read, it seems to me on the whole that the case submitted under this Section in the case of a conviction must be intended by the Legislature to be submitted for a wider purpose than simply that of becoming an appeal presented by the prisoner. The words are:—“If the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court.” Now the Court may disagree with the verdict of the jury, either on the ground that the jury had not followed its directions on a point of law, or on the ground that the jury had found the facts against what appeared to the Judge the weight of evidence. If the Legislature had intended the case which was to be submitted by the Judge in the event of a conviction to be limited to a point of law only, nothing would have been easier than to have used words which would have made that limitation perfectly unmistakable. But the words I have read are on the contrary general words without any limitation at all; and it seems to me impossible in reason to construe them otherwise than as extending to a disagreement with the verdict on matter of fact as well as on matter of law.

And then the Section goes on to say:—“And if the Court considers it necessary for

“the ends of justice to do so.” It appears to me that justice may as much require that a verdict of the jury should be revised in a case in which the jury has gone wrong on facts as in a case where it has made a mistake in regard to law. So that, on the whole, I think there is really no limitation as to the nature of the case which the Judge may send up to the High Court under this Section. In other words, I think he may submit to the High Court a case in which he disagrees with the jury in their finding of facts as well as a case in which he complains that the jury has not followed his directions as to the law. And I think that the word “*but*” may possibly be used not so much in opposition to the word “*appeal*” in the first part of the passage, as perhaps in opposition to or enlargement of the enactment of Section 272. According to Section 272, “the Local Government may direct an appeal by the public prosecutor or other officer specially or generally appointed in this behalf, from an original or appellate judgment of acquittal; but in *no other case* shall there be an appeal from a judgment of acquittal passed in any Criminal Court.”

Construing the word “*but*” to be used with reference to this Section, it would simply mean that, upon a case submitted by the Judge, the Court may, in the event of an acquittal, convict the accused person on the facts notwithstanding the general prohibition to be found in the words of Section 272, which I have read.

Or, again, it may be used with reference to the situation of a case so submitted by the Judge when it comes up to the High Court. That situation is peculiar in this respect, namely, that no judgment has been passed in the Court below from which this, so to speak, appeal has been brought; and this part of the passage may, therefore, mean that in the event of the Court upon consideration of the case submitted being of opinion that there should be a conviction and judgment thereon, it is empowered to pass it as an original Court, notwithstanding, and indeed because, there has been none passed in the Court below.

However this may be, it seems to me, after the best consideration which I can give to the question, that on a case submitted by a Sessions Judge under the provisions of Section 263, the High Court can acquit the prisoner, if it so thinks fit, on the facts, notwithstanding that the jury has found the prisoner guilty.

I construe the words "*shall deal with the case so submitted as with an appeal*," simply as directing the procedure to be followed, such as regards the notices which are necessary to be served, and so on. And I apprehend that under these words the Court may, if the case calls for it, send for additional evidence; and may deal with the case generally as is provided in Chapter XX with regard to appeals. No doubt the result of this construction is that the prisoner is in a better situation with regard to an appeal if that appeal be made through the intervention of the Judge under Section 263, than if he had preferred it himself, because Section 271 undoubtedly says that if the conviction was in a trial by jury, the appeal by the person convicted shall be admissible on a matter of law only. But this is not the only peculiarity of a similar kind which is to be found in this new Criminal Procedure Code, because in the event of the conviction of a prisoner by a jury for the crime of murder and sentence of death following thereon, upon the reference which must be made to this Court for confirmation of the sentence, this Court has the power by Section 288 to acquit the prisoner on the facts, although if the prisoner had been sentenced to transportation for life, instead of to death, and had simply himself appealed, the Court would not have been able to disturb the verdict of the jury on the facts.

I am, therefore, of opinion that all the prisoners, excepting the first prisoner, should be acquitted and discharged from custody so far as this conviction is concerned. The case is different with regard to Koonjo Leth, because he undoubtedly has confessed to have taken a part in the dacoity, and that confession is ample evidence as against him to support the conviction. As it falls upon us to pass sentence upon Koonjo Leth, we think that the sentence should be three years' rigorous imprisonment.

Glover, J.—I concur in this judgment except in so far as doubt is thrown upon the occurrence of the dacoity. I see no reason to discredit the evidence on this point, and the jury were satisfied that a dacoity did take place.

The 21st April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, W. Ainslie, and C. Pontifex, *Judges*.

Unlawful Assembly—Common Object—Murder—Rioting—Act XLV of 1860 ss. 148 & 149.

The Queen

versus

Sabid Ali and others, *Appellants*.

Committed by the Magistrate, and tried by the Sessions Judge of Buckergunge, on a charge of murder.

Baboos Umbica Churn Bose and Rojoneenath Bose for the Appellants.

HELD (*Ainslie, J.*, dissenting), that s. 149 of the Penal Code is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. In order to bring a case within s. 149, the act must be done with a view to accomplish the common object of the unlawful assembly, or it must be proved that the offence, though committed in prosecution of the common object of the unlawful assembly, is one which the accused knew would be likely to be committed in prosecution of the common object.

Per Jackson, J.—Any offence done by a member of an unlawful assembly in prosecution of the particular one or more of the five objects mentioned in s. 141, which is or are brought home to the unlawful assembly to which a prisoner belongs, is an offence within the meaning of the first part of s. 149.

Where a certain number of persons, members of an unlawful assembly (party A) attacked another party (B) who were in occupation of land, with the view to drive them off the land by force, and one of the members in party A fired a gun at and killed one of the persons in party B, in consequence of a sudden and unexpected resistance which was offered by party B, it was held (*Ainslie, J.*, dissenting) on a consideration of the evidence that the persons composing party A other than the person who fired the gun could not be convicted of murder under s. 149 Penal Code. The conviction was altered under the circumstances to one of rioting armed with a deadly weapon under s. 148 of the Penal Code.

Ainslie, J.—In this case there was a dispute about a piece of land between Fukeer Buksh and Sabid Ali, which ended in a riot in the course of which a man named Tureebollah, one of the party of the prisoners, fired a gun and killed Samed Ali. It has been found by the Judge that Tureebollah was a member of an unlawful assembly, of which the prisoners whose appeal is now before the Court were also members, and as to Sabid Ali it is also shown by the evidence that he directly invoked the aid of the party

among whom was this Tureeboollah armed with a gun.

Tureeboollah himself is not under trial, but the Judge, in order to apply the provisions of Section 149 of the Penal Code to the other prisoners, has considered the nature of the offence committed by Tureeboollah, and has found that it was murder; and in that finding I think he was clearly right. Under Section 149 he has convicted the present appellants of that same offence, and sentenced them to transportation for life. If they are rightly convicted under that Section, the Court can pass no milder sentence. If that punishment is too severe, it can be reduced by the Local Government; but the only question just now before us is whether the conviction and sentence are according to law.

Section 149 runs as follows:—"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing that offence is a member of the same assembly is *guilty of that offence*." These last words are very stringent. If the Section applies, the Court is bound to convict of the particular offence.

Tureeboollah committed the offence of murder. He was at the time of the murder a member of an unlawful assembly. The accused were also members of that unlawful assembly at the time when the murder was committed. Then the questions are, firstly, was the murder committed in prosecution of the common object of the assembly; and, secondly, did the accused know that such an offence was likely to be committed.

As to the first I find it impossible to say that the murder which occurred was not committed in prosecution of the common object. It seems to me that the common object was not merely to eject the party of Fukeer Buksh from the disputed field, but that it was to do so by show of force, and if necessary, by actual force. I do not think it possible on the evidence to say that the common object was limited to the ejection, and that the use of force was not deliberately contemplated. Nor do I think that we may say that force was only a means to an end, and that the ultimate object of obtaining possession of the field was the only common object of the party. It was clearly the deliberate intention of the unlawful assembly to use certain means to obtain a certain end,

and I am therefore unable to come to any other conclusion than that the common object was compounded both of the use of the means and the attainment of the end. The evidence distinctly establishes that a number of men proceeded to the spot to eject Fukeer Buksh; that they or several of them were armed with *lattees*; and that one who was found in the party when the riot commenced, though we do not know when he joined it, was armed with a gun, and that on resistance being offered they proceeded to use violence; and judging of their intentions from their actions, I cannot help finding that it was from the first their intention to overpower by force any resistance to the occupation of the field. This violence actually extended to the causing of the death of Samed Ali under circumstances which undoubtedly made the homicide murder on the part of Tureeboollah: on this point I believe we are all agreed.

I then come to my second question: was this murder an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of their common object, such common object being the use of force, if necessary, to obtain possession of the land. I take it that when the law speaks of a man knowing the probable result of his acts, it means that an ordinary man bringing his reason to bear on the matter must know that such result will probably ensue from his act. If *A* intentionally and without lawful excuse fires a bullet into *B's* body, he, if not of unsound mind, must know that death is the probable result, though he does not know that death will actually result. *B* may recover; but if he does not recover, the causing of death is the intentional act of *A*. It is no excuse for *A* to say that he had not brought his mind to bear on the consequences of his act; that he had not thought of the matter, and therefore did not know at the time of committing the act what the probable result would be. If the act done is such that a reasonable man who chooses to consider it must know the probable result, the law will presume the exercise of reason and the consequent knowledge.

A number of men armed with clubs go out to enforce a right or supposed right by the use of those clubs. Resistance is offered, and it becomes a question whether they, instead of overpowering their adversaries, are not overpowered themselves. Is it likely that under such circumstances they will measure their blows? yet clearly they have no

right of private defence, and if they cause hurt in any degree, they must take the consequences. It cannot be said that a man who attacks another with a weapon calculated to inflict serious injury, though without intention of taking life, and finds unexpected resistance, is justified by that resistance in taking life. It may not have been his intention at first to do so, but it comes to be his intention, or at any rate he under the pressure of the position into which he has forced himself, comes to commit an act so imminently dangerous that it must in all probability cause such bodily injury as is likely to cause death without any excuse for incurring the risk of causing such injury, and by that act he commits murder. As it is with the individual, so also is it with the members of an unlawful assembly collected with the common object of gaining a certain end by violence, if it cannot be obtained otherwise. They are bound to assume that the persons they are about to attack will exercise their right of private defence; and, as it seems to me, they must therefore contemplate the probability of the use of very considerable force, and cannot with any show of reason say that the hurt likely to be inflicted is likely to be limited at any precise degree. They possibly do not wish to cause the death of any man, and would be well content to gain their end without striking a blow by the mere show of force; but for all that it is their intention to strike, if their end cannot be otherwise gained: and if a very great amount of violence becomes necessary and is used either to overcome the resistance of the opposite party, or to extricate themselves from the position in which they have placed themselves (their opponents being still within the limits of their right of self defence) I, for one, cannot but say that the use of that amount of violence, and nothing less, was within their intention: and that being so, I am forced to say that any probable result of that violence was within their knowledge. Homicide is a certainly probable result, and it can hardly be that such homicide under the circumstances can be anything less, as regards the individuals whose act directly causes death than murder, and it therefore follows that the probability of the commission of the offence of murder was within their knowledge.

In this particular case we have one of the party to which the accused belonged armed with a loaded gun,—a weapon that could not be used as a weapon of offence without imminent risk to life; and therefore I look

upon this case as one in which the probability of the commission of the offence of murder was more than usually great and more certainly within the knowledge of the parties. It may be that the accused could have shown circumstances from which the Court ought to infer that the use of that gun was not within their intention or knowledge, but I do not think that the prosecution was bound to prove that no such circumstances existed.

Finding that the murder was committed in the prosecution of the common object of the unlawful assembly, and that it was an offence which the accused knew to be likely to be committed in the prosecution of that object, I am compelled by the words of Section 149 to hold that the accused as members of the unlawful assembly are guilty of murder. I would, therefore, on this appeal uphold the conviction and sentence, leaving the question of mitigation of punishment to be dealt with separately.

Phear, J.—The four prisoners whose petition of appeal is now before us are named Sabid Ali, Ain Ali *alias* Anoo Alia, Kaloo Sikdar, and Gundhurbo Khan. They have been convicted by the Sessions Court, constituted of a Judge and two assessors, of the offence of murder, under the provisions of Section 149 of the Indian Penal Code, and have been sentenced each to the punishment of transportation for life.

The Judge states the material facts of the case thus:—

“I agree with the assessors that it is clearly proved that the prisoners and others attacked Fukeer Buksh, whilst he was ploughing his own land in company with his three kinsmen and co-sharers, Samed Ali, Shuruf Ali, and Kadez Ali, and that in the struggle Tureeboollah, one of the attacking party (but not, it may be observed, one of the prisoners), fired a gun loaded with small shot, killing Samed Ali on the spot, and wounding Shuruf Ali in the back.”

The Judge then says:—“All the prisoners therefore as taking part in the riot and having the same object in view, namely, to drive Fukeer Buksh off the land, are in the eye of the law guilty of murder;” and, again, after discussing the previous relations between the parties, the Judge gives the facts of the occurrence in little more detail as follows:—

“It seems to me, therefore, quite clear first that the land was in the possession of Fukeer Buksh, and that he and his companions were ploughing it when they were attacked, and second that the reason assigned

"by Fukeer Buksh for the attack is the natural and probable one, viz., that Sabid Ali having paid up the full rent was determined not to allow Fukeer Buksh to hold and cultivate his land until he made good his quota.

"I cannot doubt that the unexpected resistance offered by Samed Ali and Shuruf Ali, but more especially by the former, who was a young and powerful fellow, and who snatched a *lattee* from the hands of one of his adversaries and laid about vigorously with it, led to the sudden, and probably at first unintended, use of the gun by Tureeboollah. Finding his party driven back by the two men, Samed Ali and Shuruf Ali, for the two old men, Fukeer Buksh and Kadez Ali, were not of much account (though Fukeer Buksh's right hand shows that he was considerably knocked about), Turab Ali raised his gun and fired, striking the advancing Samed Ali full in the chest. Shuruf Ali saw the impending blow and just had time to turn and fly, and so received a considerable portion of the charge in his back.

"I hold it therefore proved on the evidence that all the prisoners are guilty of the offence laid to their charge.

"The Court concurring with the assessors finds that Sabid Ali, Ain Ali *alias* Anoo Alia, Kaloo Sikdar, and Gundhurbo Khan are guilty of the offence specified in the charge, namely, that they being members of an unlawful assembly, in the prosecution of the common object of which, namely, to enforce a supposed right to a certain piece of land, one Tureeboollah, a member of the said unlawful assembly, committed murder by causing the death of one Samed Ali, have committed the offence of murder, and have thereby committed an offence under Section 149 of the Indian Penal Code punishable under Section 302 of the said Code, and the Court directs that the said Sabid Ali, Ain Ali *alias* Anoo Alia, Kaloo Sikdar, and Gundhurbo Khan be each punished with transportation for life from this date."

It appears to me that the reasoning by which the Judge, on the facts thus stated by him, brings the charge home to the prisoners is somewhat incomplete. The words of Section 149 Indian Penal Code are as follow:—

149. "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly

knew to be likely to be committed in prosecution of that object; every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

These words do not, in my opinion, support the view which the Judge expressed at the outset of his judgment, and by which he appears to have been guided to his final decision to the effect, that because murder was committed by one member of the assembly, therefore all the prisoners as taking part in the riot and having the same object in view, namely, to drive Fukeer Buksh off the land, were in the eye of the law guilty of murder. It seems to me clearly not the case that every offence which may be committed by one member of an unlawful assembly while the assembly is existing, *i. e.*, while the members are engaged in the prosecution of a common object, is attributed by Section 149 to every other member. The Section describes the offence which is to be so attributed, under two alternative forms, viz., it must be either—

1st.—An offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly.

2nd.—An offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.

Now, inasmuch as the continuance of the unlawful assembly is by the definition of Section 141 made contemporaneous with the prosecution of the common object, it seems tolerably clear that the Legislature must have employed the words "prosecution of the common object" with some difference of meaning in these two passages respectively. Also the mere fact that the Legislature thought fit to express the *second* alternative appears to show very distinctly that it did not intend the words "in prosecution" which are found in the *first* to be equivalent to "during the prosecution;" for if they were, then the second alternative would have clearly been unnecessary. And a comparison with this passage of the language which is used in Section 460, where the Legislature makes all the persons concerned in committing a burglary punishable with transportation for life, if *any one* of their number at the time of the committing of burglary causes death, &c., strongly bears out this view. I am of opinion that an offence, in order to fall within the first of the above alternatives, *i. e.*, in order to be committed in the prosecution of the common object must be immediately connected with that common object

by virtue of the nature of the object: for instance, if a body of armed men go out to fight, their common object is to cause bodily injury to their opponents, and in that case death resulting from injury caused would be homicide committed in prosecution of the common object.

And an offence will fall within the second alternative, if the members of the assembly, for any reason, knew beforehand that it was likely to be committed in the prosecution of the common object, though not knit thereto by the nature of the object itself.

It seems thus, on a little consideration, to be apparent that the two alternatives of Section 149 do not cover all possible cases of an offence being committed by one member of an unlawful assembly during the time when the common object of the assembly is being prosecuted. It follows that in every trial of prisoners on a charge framed under the provisions of Section 149 of the Penal Code, even when it is proved that the specified offence was committed by one of the members of the assembly during, so to speak, the pendency of that assembly, it yet remains an issue of fact to be determined on the evidence whether that offence was committed in prosecution of the common object, as I have endeavoured to explain the meaning of those words in the first part of the Section; and, if not, whether it was an offence such as the members of the assembly knew to be likely to be committed in the prosecution of the object.

Returning now to the particular facts of the present case, I think there appears to be abundant reason for coming to the conclusion that Tureeboollah committed murder in the way described by the Judge. But it seems also clear that murder, or even the taking of life, was not *immediately* connected with the common object of the unlawful assembly of which the prisoners were members. That common object was, as the Judge expresses it, to drive Fukeer Buksh off the land and to prevent him from cultivating it. There is, however, nothing in the evidence to indicate that the members of the assembly were prepared, and intended to accomplish that object at all hazards of life. I do not think that they intended to attain the common object by means, if necessary, of murder. Indeed the Judge himself says that the resistance offered by Samed Ali and Shuruf Ali was unexpected by the prisoners' party and that it led to the sudden, and *probably at first unintended*, use of the gun by Tureeboollah. This being so, I find myself unable,

sitting as a Judge of fact on this appeal, to arrive at the conclusion that Tureeboollah committed murder in prosecution of the common object of the unlawful assembly within the meaning of the first part of the Section.

Neither do I think it is satisfactorily made out by the evidence that the prisoners knew it to be likely that this offence of murder would be committed in the prosecution of the common object of the assembly within the meaning of the second part of the Section, taking that object to be the driving Fukeer Buksh off the land. It was *a priori* possible, and indeed most probable, that that object would be effected without any risk of life whatever. The assailants had reason to suppose, indeed knew quite well, that the party they were about to attack was absolutely unarmed. The members of the unlawful assembly generally, including the prisoners, might reasonably have expected (and there is nothing whatever in the event to show that they did not) that Fukeer Buksh and his co-laborers would be driven off the land by the mere show of such force as they had, or at any rate by the use of force very far short of life-taking; and even if I allowed myself to be carried by the evidence so far as to think (as I do not) that the prisoners and the other members of the unlawful assembly knew that culpable homicide was likely to be committed in the prosecution of the common object, still I should be unable to say that their knowledge also included any of the ingredients of aggravation which are required in order to convert the offence of culpable homicide into the offence of murder. It is obvious that in the events which happened those ingredients were of sudden origin and were entirely personal to the actual murderer. Tureeboollah committed murder by doing, on the spur of the moment, a previously unintended act, which act however he must himself be taken to have known at the time was so imminently dangerous that it must in all probability cause death, or such bodily injury as was likely to cause death, and which did in fact cause death. If, then, the prisoners knew that murder was likely to be committed in the shape in which it was committed, they must have been aware that it was likely one of the members of the unlawful assembly would do an act which would be *likely* to cause death, and which *would in fact* cause death,—a statement which on the face of it seems to be a contradiction of terms. In truth, when the second likelihood comes to

be placed upon the first, it has the effect in my judgment of removing the case altogether from the scope of Section 149. And none of those forms of murder from which "likelihood" is absent are brought by the evidence in this case within the contemplation of the prisoners, or of anybody else. There is nothing to suggest that the prisoners (or indeed any of them) knew that it was likely that an act would be done by one of the members of the assembly with any of the intents mentioned in the first three Clauses of Section 300 of the Penal Code and would cause death.

On the whole, I think that the prisoners have been wrongly convicted of the charge framed under Section 149. I think, however, that the facts established against them certainly amount to rioting; and it appears also that they were all armed with heavy *lattees*. Therefore, under the provisions of Section 148, they are punishable with imprisonment for a term which may extend to three years.

Accordingly I would reduce the sentence passed by the Sessions Judge to a sentence of rigorous imprisonment for three years.

Couch, C.J.—The appellants in this case have been convicted under Section 149 of the Penal Code. A comparison of this Section with Section 460 shows, as has been noticed by my brother Phear, that Section 148 is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. The difference of the language of the two Sections seems to show that the legislative authority had in its mind the distinction between the two cases; and it is not sufficient, in order that a person may be convicted under Section 149, that there should be an unlawful assembly, that the members of it should be prosecuting the common object of it, and that an offence should be committed by one of them.

I need not repeat the language of the Section. It is divided as it seems to me into two parts, and in my opinion, in order to bring a case within the first part, namely, that which speaks of the offence being committed in the prosecution of the common object of the assembly, the act must be one which, upon the evidence, appears to have been done with a view to accomplish the common object. I think this is the meaning of that part of the Section, and we must see whether the act was done with that view.

The Sessions Judge has found, and I think correctly, that the common object in

this case was to drive Fukeer Buksh off the land, and he has stated, I also think in accordance with the evidence, what occurred. "I do not doubt," he says, "that the unexpected resistance offered by Samed Ali and Shuruf Ali, but more especially by the former, who was a young and powerful fellow, and who snatched a *lattee* from the hands of one of his adversaries and laid about vigorously with it, led to the sudden, and probably at first unintended, use of the gun by Tureeboollah. Finding his party driven back by the two men, Samed Ali and Shuruf Ali, for the two old men, Fukeer Buksh and Indaz Ali, were not of much account (though Fukeer Buksh's right hand shows that it was considerably knocked about) Tureeboollah raised his gun and fired striking the advancing Samed Ali full in the chest." That does not appear to me to be an act done by Tureeboollah with a view to accomplish the object of driving the other party off the land, but in consequence of the unexpected counter-attack of that party and with a view to prevent or repel it. I think that is the fair conclusion from the evidence; and certainly in a case of this description where, if the accused are found guilty, they are liable to a sentence of death; if there is a reasonable doubt as to the view with which the gun was fired, they ought to have the benefit of it. I am unable to say, upon the evidence in this case, that the firing of the gun was done in the prosecution of the common object of the assembly.

Then I have to consider the second part of the Section,—that the offence is to be such as the members of the unlawful assembly knew to be likely to be committed in the prosecution of the common object. At first, there does not seem to be much distinction between the two parts of the Section, and I think the cases which would be within the first offences committed in prosecution of the common object, would be, generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. But I think there may be cases which would come within the second part, and not within the first. Without laying down the law as to any other case than that before us, I think there might be a case of this kind. Persons assemble with a view to attack and plunder the house of a particular person; that would be an unlawful assembly, and the common object of the assembly would be house-breaking, or the other offences which would be included in such acts as attacking and plundering a man's house; but from some cause,

such as a show of resistance, they might not continue to prosecute that common object; and before they had dispersed, and whilst they continued to be an unlawful assembly, some of them might plunder another house, and thereby commit an offence. Such a case might come within the second part of the Section, as an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, but which was not committed in the prosecution of it. But that is a case which we should have to determine when it arises: I only mention it as showing that there may be cases which would come within the second, but not within the first part of the Section.

The question in this case is whether upon the evidence we can say that these persons, when they met together with the object of driving Fukeer Buksh and his party off the land, supposing they knew that Tureeboollah had a gun with him, knew also that he was likely to make use of it in such a manner as to be guilty of the offence of murder. Seeing what is necessary to constitute that offence, I am unable upon this evidence to come to the conclusion that these persons knew that this was likely. I think it is not only possible, but probable, that they did not think that the gun would be used in that manner by Tureeboollah. And it seems to me, upon the finding of the Sessions Judge, that it was so because he appears to have thought that the use of the gun was sudden and probably unintended. He seems to have thought that if nothing more had occurred than the driving the party off the land, and what might naturally be expected to happen in doing that, the gun would not have been used in such a manner as to make the person using it guilty of murder, and as I said in regard to the first part of the question, we are bound, where there is a reasonable doubt, to give the accused the benefit of it.

I concur with the other members of the Court in thinking that the accused ought not to have been convicted under Section 149, but they may properly be convicted under Section 148. The conviction will be altered accordingly, and the sentence will be one of three years' rigorous imprisonment.

Jackson, J.—It appears to me that the construction of this Section (149), that is, a construction which shall be at once reasonable and grammatical, involves two difficulties, or at least two points which call for attentive consideration:—

1st—"The common object,"

2nd—or "such as the members of that assembly knew to be likely to be committed in prosecution of that object."

It has been proposed to interpret the "common object" in a precise sense so as to indicate the exact extent of violence to which the rioters intended to go, *viz.*, to take possession of the land by force extending, if need be, to wounding and the like.

This I think is not the sense in which the words were intended to be understood.

They are not, it seems to me, used in the same sense as "the common intention" in Section 34, which means the intention of all whatever it may have been.

The words here seem to have manifest reference to the defining Section 141, and to point to one of the five objects, which being common to five or more persons assembled together, make their assembly unlawful.

For this reason, I think that any attempt to mitigate the rigour of the Section by limiting the construction of the words "common object" must fail, and that any offence done by a member of an unlawful assembly in prosecution of the particular one or more of the five objects mentioned in Section 141, which is or are brought home to the unlawful assembly to which the prisoner belonged, is an offence within the meaning of the first part of the Section.

We then come to the second point, *i.e.*, the meaning to be given to the words "or such as the members," &c.

If the word "or" here be used in an alternative sense, the sentence would, if fully expressed, run thus,—if an offence is committed, which is committed in prosecution, or which, if not so committed, is yet such as the members knew to be likely—which seems absurd.

Nor can it be believed that the Legislature intended to attach the consequences of, say murder, committed by a member of an unlawful assembly in prosecution of the common object to all members of that assembly, unless those members had a knowledge that the commission of murder was likely as an incident of their endeavours to carry out the "common object."

For this would be consequence, if the word "or" be a simple alternative, and if the first condition being fulfilled, *viz.*, that the act was committed in prosecution of the common object, it was unnecessary to resort to the second, in which case the finding would simply be that an offence, namely murder, had been committed by a member of the unlawful assembly in prosecution of the common

object thereof. Although the person who actually committed the murder had used means not within the contemplation of the others, such as the firing of a concealed pistol or the like, and all the other members of that assembly would therefore be liable to be hanged or transported for life at the discretion of the Judge, a thing which seems impossible to have been within the intention of the Legislature.

But if the word "or" be treated with some violence I admit as illustrative, or instead of "and," and the knowledge of likelihood be thus a further condition imposed, the law becomes at once reasonable and intelligible.

In view of the difficulties caused by the Section, I was at first strongly inclined to believe that the word "or" had crept in by a misprint or clerical error, either instead of "and," or simply as an addition to the text; and I applied for information to the Legislative Department. My learned friend Mr. Whitley Stokes, however, assures me that the word appears in all the copies of the Code as successively considered and amended as far back as 1856, when the Section as it now stands took the place of the original Section numbered 133, which may be seen at page 32 of the Edition printed in England in 1851, and which was of a different character.

In the difficulty which besets us, the construction which I have suggested is the only one which seems to me possible, and I could not consent upon Section 149 to subject any person to the consequences of an offence which, though committed in prosecution of the common object of the unlawful assembly, he himself had not directly contemplated, unless it were proved that he knew it to be likely that such offence would be so committed.

In the particular case before us, I concur in the view of the facts taken and in the order to be made by the majority of the Court.

Pontifex, J.—In this case the Sessions Judge has found that the act which caused the murder was sudden and was unpremeditated by any member of the unlawful assembly.

The evidence fully supports such finding.

Under these circumstances I am of opinion that those members of the illegal assembly who did not commit the homicidal act cannot be considered guilty of murder under Section 149 of the Penal Code.

To apply that Section to the case of

murder, its alternative provisions must be read as follows:—

"If murder is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or if murder is committed by any member of an unlawful assembly, and the members of that assembly knew murder to be likely to be committed in prosecution of that object, every person who at the time of the committing of the murder is a member of the same assembly is guilty of murder."

In the present case the common object of the illegal assembly was to obtain possession of land by a large armed force from a small unarmed party.

In my opinion the evidence shows that the parties prosecuting that common object did not contemplate or know it to be likely that the offence of culpable homicide would be committed.

The murder committed hastily by one member of the assembly was not in my opinion committed "in prosecution" of the common object of the assembly in the planning of which no homicidal intention had been entertained.

Nor could the members of the assembly think and much less "know"—"murder to be likely to be committed" in prosecution of a common object which was intended to be, and which might naturally and probably have been, accomplished without homicide.

To bring the offence of murder as defined by the Code within Section 149, I think it must either necessarily flow from the prosecution of the common object; or it must so probably flow from the prosecution of the common object that each member might antecedently expect it to happen.

The offence of murder as strictly defined by the Code requires a previous intention or knowledge in the perpetrator; and to "know" that murder is likely to be committed, is to know that some member of the assembly has such previous intention or knowledge. The word "knew" used in the second branch of the Section is I think advisedly used, and cannot be made to bear the sense of "might have known."

This interpretation of Section 149, so far as murder is concerned, seems to me confirmed by comparing Sections 398 and 396 with Sections 148 and 149.

From Section 398 it appears that being armed with a deadly weapon at a dacoity is considered an offence deserving of far greater punishment than the offence under Section

148 of being armed with a deadly weapon at a riot.

The reason for this distinction must be that more serious consequences are likely, and must be known to be likely, to result from an armed assembly at a dacoity than at a riot, and yet if murder is committed by one of five dacoits, the others are not guilty of murder, and may be sentenced to imprisonment for any term under ten years; while if Section 149 is to be construed as it has been construed by the Sessions Judge in this case, if murder is committed by one of five rioters the others would all be guilty of murder, and must be sentenced to death or transportation for life, though less serious consequences would antecedently be likely to result than from a dacoity.

I am therefore of opinion that the prisoners who have appealed are not guilty of murder; but as it appears from the evidence that they were members of an illegal assembly and were all armed with *lattees*, they are guilty of an offence under Section 148, and ought in my opinion to be sentenced to three years' rigorous imprisonment.

The 30th April 1873.

Present:

The Hon'ble F. B. Kemp and J. B. Phear,
Judges.

Procedure—Sessions Judge—Appeal—Acquittal.

(Miscellaneous Case.)

Khernj Mullah and others, *Petitioners,*

versus

Janab Mullah, *Opposite Party.*

Mr. M. Ghose and Baboo Byhunt Nath Dass
for the *Petitioners.*

No one for the opposite party.

If the evidence which comes before a Sessions' Judge in a regular appeal from a Magistrate's order is not

sufficient to reasonably satisfy him that the prisoners have been rightly convicted, he ought to acquit them.

Phear, J.—It seems to us that the Judge treated the appeal before him more as if it was a special appeal than a regular appeal; and because he did not find sufficient on the record to convince him that the Magistrate was entirely wrong, he therefore affirmed his decision.

But the Judge was in the situation of an Appellate Court in which the matter came before him on regular appeal, and he ought to have judged as best he could from the materials put before him on the Magistrate's written judgment, whether or not as a matter of fact the prisoners had committed the offence of which they had been convicted. On reading the Sessions Judge's judgment, it seems pretty clear that he was unable even with the aid of the Magistrate's finding of fact to form an independent judgment as to whether the prisoners had committed the offence or not. That being so, it was, I think, his duty to have acquitted them. If the evidence which came before him, whatever its shape, was not sufficient to reasonably satisfy him that the prisoners had been rightly convicted, he ought to have acquitted them.

There is a passage in his judgment which leads us to suppose that the Sessions Judge somewhat misapprehended the effect of the decision of a Division Bench of this Court passed upon his previously made reference. He appears to imagine that he was in some way bound by that decision of this Court to accept the finding of fact come to by the Magistrate. The decision of the Division Bench has been read to us, and Mr. Justice Kemp indeed pronounced that decision, and I think it quite clear that it was not the intention of the Division Bench to fetter the Sessions Judge in any way in regard to his judgment on the facts of the case from the evidence such as it was disclosed in the Magistrate's judgment. We think, as I have already said, that so far as we can arrive at the Judge's view, he ought to acquit the prisoners instead of dismissing the appeal. We accordingly direct that they be acquitted; and discharged so far as discharge is concerned.

The fine, if paid, must be refunded.

The 7th May 1873.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, Judges.

Procedure—Land Dispute—Evidence—Act X of 1872 s. 334.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Officiating Sessions Judge of 24-Pergunnahs.

Khettromony Dasi, Petitioner,

versus

Sreenath Sircar and others, Opposite Party.

Baboos Aushootosh Dhur and Kamolahant Sein for the Petitioner.

In a case of a dispute regarding land commenced under the old Code of Criminal Procedure, the evidence must be recorded in the manner provided for by s. 334 and the following sections of the new Code.

Jackson, J.—THIS is a case referred by the Officiating Sessions Judge of 24-Pergunnahs under Section 296 Act X of 1872, for the purpose of annulling under the powers of revision vested in this Court the proceedings of Mr. Jeffery, the Joint Magistrate of Diamond Harbour in that district, who, on the 12th February 1873, made an order for the attachment of some 57 beegahs of paddy lands, and also gave orders relating to the disposal of the crops which had been previously cut by order of the said Joint Magistrate.

The Sessions Judge has pointed out four particulars on which he considers the proceedings of the Joint Magistrate irregular, and we have before us the Joint Magistrate's letter dated the 24th April last in which he offers explanation of those proceedings.

We consider that the proceedings complained of are so erroneous in one particular, that it is unnecessary to enquire into the other grounds of objection. These proceedings were commenced under the old Code of Criminal Procedure. Under the rulings of this Court applicable to the Sections relating to cases of this sort in the old Code, it has been repeatedly held by the High Court that an adjudication on legal grounds as to the imminence of a breach of the peace was a necessary preliminary to the

commencement of proceedings. Section 530 of the new Procedure Code supersedes those rulings, but of course the benefit of this Section cannot be claimed in respect of any irregularity in the present proceedings. The error to which I refer and which is an error under the present Procedure Code is one which I think vitiates the order of the Joint Magistrate. Although, as I have already stated, the proceedings were commenced under the old Code, yet the enquiries made and the order passed were under the present Code. Section 530 Act X of 1872 provides:—"Such Magistrate may satisfy himself of the existence of a dispute likely to induce a breach of the peace from a report or other information; but the question of possession must be decided on evidence taken before him." Chapter XXV deals with the mode in which such evidence is to be taken, and by Section 332 it is provided that "in enquiries and trials (other than summary trials) under this Act, the evidence of the witnesses shall be recorded by the Magistrate or the Sessions Judge, as the case may be, in the following manner." Now from trials there are first excepted "summary trials," and in respect of these a distinct procedure including provisions as to evidence has been provided by Chapter XVIII of the Code. Then "trials," after that exception, have been again subdivided into "summons cases" under Section 333 and other trials which are included with enquiries in the words all "other cases" in Section 334, and consequently it follows that we are to look to Section 334 and the following Sections for the manner in which evidence is to be recorded in enquiries such as that now under consideration before the Magistrate. Section 334 directs that in such cases "the evidence of each witness shall be taken down in writing in the language in ordinary use in the district in which the Court is held, by or in the presence and hearing and under the personal direction and superintendence of the Magistrate or Sessions Judge, and shall be signed by the Magistrate or Sessions Judge."

Under this provision there is no exception whatever in favor of cases in which no appeal lies. The Joint Magistrate therefore was entirely in error in omitting to record the evidence in the mode prescribed by Section 334 and the following Sections. This appears to us to be an error so material that, under Section 297, we are bound to quash the proceedings, and set aside the

order of the Joint Magistrate as being founded on no evidence.

In respect of the land it is unnecessary for us to make any further order, and probably we have no power to make such order. It is always open to the Magistrate, if he thinks it necessary for the preservation of public peace, to bind parties who he considers are likely to break the peace by taking security or recognizance from them.

The money obtained by sale of the crops being now in deposit, it seems to us from the necessity of the case that it should remain so until the parties either come to a settlement of their dispute, or some of them establishes a right to the land, which must be in the Civil Court.

The 7th May 1873.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Fishery—Theft—Civil Suit—Damages.

(Miscellaneous Case.)

Bhusun Parui and others, *Petitioners,*

versus

Denonath Banerjee, *Opposite Party.*

Baboo Mohesh Chunder Chowdhry, Russunt Coomar Bose, and Upendra Naryun Muzoomdar for the Petitioners.

Mr. M. L. Sandel for the Opposite Party.

Where the accused caught fish in a portion of a navigable river which was claimed by the prosecutor, it was held that they could not be convicted of theft, and that if the right of the prosecutor was infringed he could sue in the Civil Court for damages.

Jackson, J.—THE petitioners before us caught fish in part of the river Bhagirutty, which is claimed by the prosecutor's employers as their izarah mehal. They alleged that they and other jelyas had been accustomed from time immemorial to catch fish in the same place, but the Deputy Magistrate being of opinion that the right of the fishery in that part of the river was proved by indisputable documentary evidence to be the property of the prosecutor's employers, and also that the right of those employers to the

same had been upheld in a civil suit before the Moonsiff of Culna, considered that the accused were guilty of theft, and sentenced them to a fine of Rs. 10 each, or in default to rigorous imprisonment for two weeks, and further ordered that Rs. 10 of the fine be paid to the prosecutor as compensation and that the value of the fish found with the accused be paid to him (prosecutor).

Baboo Mohesh Chunder Chowdhry for the petitioners points out that the fish so caught cannot be said to have been taken out of the possession of the prosecutor, and that consequently there was no theft.

Mr. Sandel appeared for the prosecutor and admitted that the conviction of theft could not be maintained, but he suggested that the act which the petitioners have done amounted to a different offence under the Indian Penal Code, and that we should enquire into that matter and order a different conviction to be substituted. There can be no doubt that the conviction of theft in this case was improper. If, as alleged by the Deputy Magistrate (and it seems highly improbable) that part of the river Bhagirutty, which is a large navigable river, has been found by the Civil Court to be the property of the prosecutor's employers, they will be at liberty to sue for damages any person who infringes their right of property. The prisoners certainly could not be convicted of theft, and under the circumstances we do not think it proper to enquire whether they could be tried for any other offence under the Penal Code.

We therefore set aside the conviction by the Deputy Magistrate, and order that the fine, if realized, be restored to the petitioners.

The 9th May 1873.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Procedure—Reference—Magistrate of Second Class—Act X of 1872 s. 46.

Reference to the High Court under Section 297 of the Code of Criminal Procedure by the Deputy Commissioner of Julpigori.

Sobil Dass

versus

Chundra Deb and others.

The High Court refused to interfere on a reference made to it by a Deputy Commissioner in a case which

was sent up for heavier punishment to the Deputy Commissioner under s. 46, Code of Criminal Procedure, by a Magistrate of the second class; as the Court was of opinion that the Deputy Commissioner, instead of referring the case, ought under that section to have tried the prisoners himself, and convicted them of any offence which he thought was made out against them by the evidence.

Glover, J.—THIS case has been referred to us under Section 297, Code of Criminal Procedure.

The accused was convicted by the Extra Assistant Commissioner of cheating under Section 415, Penal Code, and sent up to the Magistrate under Section 46, Code of Criminal Procedure, for a heavier punishment than an officer exercising second class magisterial powers was able to inflict.

The Deputy Commissioner considers that the accused ought to have been convicted under Section 420 or Section 405, Penal Code, and not under Section 415.

It might possibly be that the evidence would have warranted a conviction under either of these Sections, but we cannot say that the prisoner was wrongly convicted under Section 415. He professed to have the power of increasing the quantity of precious metals confided to him, and induced the prosecutor to give him rupees and various silver ornaments on the promise of increasing their weight two-fold. In other words, he by deceiving the prosecutor (for almost directly after he got the valuables he appears to have decamped), fraudulently and dishonestly induced him to deliver property to him. There can be no doubt about the dishonest intention, and therefore the prisoner's act comes undoubtedly within the purview of Section 415.

The punishment awardable under that Section extends to a year's rigorous imprisonment with fine, and as the fine can be made commensurate with the amount of property appropriated the punishment is by no means a light one. We do not think this is a case in which this Court need interfere. Indeed, we consider that the reference was not necessary, for if the Magistrate (who is in this case the Deputy Commissioner) thought the Extra Assistant Commissioner's proceedings faulty, he could under Section 46, Code of Criminal Procedure, have reheard the case, examined witnesses, and then have passed such judgment sentence or order as he deemed proper, and was according to law.

So that if the Deputy Commissioner thought that the evidence proved the accused to be guilty under Section 420 or Section 405, he could have tried and punished the

offender under either of these Sections without a reference to this Court. A second class Magistrate, however, would have been competent to convict under Section 405.

The papers are returned to the Deputy Commissioner.

The 9th May 1873.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges*.

High Court—Jury—Acquittal—Act X of 1872 s. 263.

Reference to the High Court under Section 263 of the Code of Criminal Procedure by the Officiating Sessions Judge of Nuddea.

The Queen

versus

Sidham Sircar, *Prisoner*.

The High Court acting under s. 263 of the Code of Criminal Procedure convicted the accused in this case on the facts notwithstanding the verdict of acquittal come to by the jury.

Glover, J.—THIS case has been referred to us by the Sessions Judge under Section 263, Criminal Procedure Code, in consequence of his disagreeing with the verdict of the jury. Notice was duly served on the accused, and we have gone through the evidence on the record.

No one has appeared for the accused Sidham.

By Section 263 we are to deal with this case as with an appeal, and have power to convict on the facts notwithstanding the verdict of acquittal come to by the jury.

Now the facts against the accused are that he made a full admission of his guilt (burning down two of the Factory wheel-houses) to the witness McDonald. He afterwards repeated his confession in a formal manner to the Magistrate of Kooshtea, and again on being committed said that that admission was true. There is not the slightest ground for distrusting the evidence of Mr. McDonald, and the official attestation of the Magistrate proves that the confession was made to him voluntarily, and was duly and faithfully recorded.

There was some corroboration of the accused's confession in the evidence of Modhoo Sirdar.

Under ordinary circumstances, we should be chary of exercising the powers given by Section 263, and should not interfere with the verdict of a jury unless fully satisfied that it had caused a failure of justice. In this case, however, we think that it has caused that failure, and that the evidence fully warranted the conviction of the accused.

The accused's statement before the Sessions that he had named witnesses before the committing officer is shown to be false. It is clear from the record that at the time of his committal, he declined to summon any witness.

Under Section 436 of the Penal Code, we convict the accused of committing mischief by fire, and sentence him to rigorous imprisonment for (2) two years.

The 29th May 1873.

• Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, Judges.

Summary Trial—Theft—Act X of 1872 s. 222.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Sessions Judge of Cuttack.

The Queen

versus

Abheen Parrida and others, Petitioners.

In a case tried under the summary procedure authorized by s. 222 of the Code of Criminal Procedure, it must clearly appear on the face of the conviction that the case was dealt with as one of those which come under the purview of that Section. If the case be one of theft, it should appear what the value of the property alleged to have been stolen really was.

Jackson, J.—THE proceedings in this case have been referred by the Sessions Judge of Cuttack for revision, the accused persons having made an appeal to his Court, but the case being one in which the penalty inflicted was not cognizable in appeal. The petitioners were tried under the summary procedure authorized by Section 222 before the Deputy Magistrate of Kandraparah, Baboo Hura Chunder Ghose, and by him convicted of the offence of theft under Section 379 of the Indian Penal Code. Jurisdiction to try cases in a summary way is conferred upon the Magistrate of the District, and upon such Magistrate of the first class as the local Government think fit to invest with such powers in respect of offences described

in Section 222, and it must clearly appear on the face of the conviction that the case was dealt with as one of those which come within the purview of that Section. Such jurisdiction is conferred in respect of theft under Section 397 of the Indian Penal Code, where the value of the property stolen does not exceed Rs. 50. The conviction in this case, which was drawn up in the form prescribed by Section 327, does not say any such thing, nor does it any where appear what the value of the property alleged to have been stolen really was. Upon this ground, we set aside the proceedings of the Deputy Magistrate as being without jurisdiction, and order that the fines, if levied, be returned to the petitioners.

But in making this order, we think it our duty to point out several most objectionable features in the proceedings of the Deputy Magistrate in this case. The accused persons were not charged with theft. The accusation made against them, as appears from the examination of the complainant taken on the back of the petition, was in these words :—"On Saturday last, Abheen Parrida and Bauchoo Parrida, accompanied by about 38 persons, forcibly uprooted and carried off my mustard grown by me on one man and five goontas of land. I have got a pottah for 1280. The defendants who had formerly cultivated the land had relinquished it to the zemindar, and I came into possession under a pottah." Now this complaint most clearly indicated a state of things altogether distinct from a charge of theft. There was, it seems upon the very face of the statement, a dispute as to possession, and the right to cut certain crops. No doubt, if the accused in the assertion of their rights had resorted to force, or otherwise brought themselves within the terms of the Indian Penal Code, for instance, as being members of an unlawful assembly, or having used criminal force, they might have been dealt with for such specific offence. The step which the Deputy Magistrate took on receiving this complaint was not to summon the parties, but to make an order "Police to investigate and report within four days." The Code of Criminal Procedure empowers a Magistrate when he sees cause to distrust the truth of the complaint, to postpone the issuing of process for compelling the attendance of the person complained against, and direct a previous enquiry or investigation to be made into the truth of the complaint, either by means of any officer subordinate to such Magistrate,

or of a local Police officer, or in such other mode as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint.

There is nothing here to indicate that the Magistrate distrusted the truth of the complaint, but rather that he resorted to the very objectionable, though not uncommon, expedient for arriving at a conclusion by referring the whole question in dispute to the Police. The Police, it seems, made an enquiry, and as the Magistrate says challanned the accused persons, by which he means sent these persons in custody before the Magistrate. With this proceeding and all traces of enquiry or investigation whatever, for the Legislature has thought fit to direct by Section 227 that in such cases the Magistrate need not record the evidence of the witnesses nor the reasons for passing the judgment, nor draw up a formal charge, and accordingly we find half a dozen lines recorded on the 11th February in the decision of the Magistrate in the case. It was in these terms:—"Plaintiff grew mustard for 1280 under a pottah from the zemindar of the estate, and the evidence shows the defendants coming in a body, took it by force. The Police challanned the prisoners. The evidence for plaintiff is concurrent and quite satisfactory, and brought the charge home to the defendants. The defendants said that the crop was grown by them, the land being they said in the occupancy of their brother Karuny Parrida. The latter was accordingly summoned and examined, and his statement was that he was no longer in possession having relinquished the land by istafa; and this was corroborated by the zemindar's gomastah, who proved also that pottah has been given to plaintiff for 1280, for which year the gomastah said the plaintiff has grown crop—mustard. I find the defendants guilty of theft." The statement of the defendants' case, as given here, is contradictory, on the face of it, of the account given by plaintiff in his first complaint. The real fact appears to be that defendants had been in occupation of the land, as is borne out by the plaintiff's own statement before the Magistrate, where he says:—"The defendants who had formerly cultivated the land had relinquished it to the zemindar." Cases of this sort are of most frequent occurrence, and every Magistrate of experience and intelligence well knows that when we find members of a joint family in occupation of land, the pottah being in the name of one of them, and the

zemindar relying upon, an alleged istafa by him, and the other members of the family relying upon their possession, there is ground for hesitation.

The party in whose name the pottah had been granted, if he has really given an istafa, could not do so to the prejudice of the rights of his co-sharers. It is very difficult to suppose that the members of the family would unite in giving up voluntarily lands which have been in their occupation, and immediately afterwards resort to violence for the purpose of maintaining themselves in possession. The Magistrate does not allege that the accused committed any particular violence, but merely that they took by force. It is clear there has been no decision of the real question as to whether the accused, who were admittedly occupiers of the land, had, as alleged by the complainant, really relinquished it or no, and it also is clear that if the accused were the occupiers of the land, the relinquishment of it by one of them would not justify the zemindar in ousting the others or giving a pottah to a third party. Under these circumstances, to convict the accused of theft and sentence them to pay each a fine of Rs. 50, and in default of payment to rigorous imprisonment of two months, is manifestly unjust, and it is not unfair to say that such a decision is, unintentionally no doubt, playing into the hands of the zemindar.

The Court in this case directed that the Deputy Magistrate should be called upon for an explanation, but it has been found impossible to comply with the order, inasmuch as the Deputy Magistrate has, since the date of his decision, retired on a pension.

The 9th June 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, Judges.

*Breach of the Peace—Recognizance—Witnesses—
Notice—Act X of 1872 s. 491.*

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Sessions Judge of Gya.

The Queen

versus

Isreepershad Singh, Petitioner.

Although a Magistrate may summon a person on credible information to show cause why he should not be

bound over to keep the peace, he cannot, under s. 491 Code of Criminal Procedure, bind over such person to keep the peace until he has adjudicated on evidence produced before him by the person accused. The notice to the accused should give him sufficient time to come in to produce his evidence.

Markby, J.—THE Magistrate has upon a previous reference been told that persons summoned to show cause why they should not be bound over to keep the peace have a right to have their witnesses examined. And in the case of this same Isreepershad Singh, on a reference in November last,* the Court, in setting aside the Magistrate's proceedings, directed him, if he still thought that security should be taken, to give the accused full opportunity of showing cause why he should not be bound over to keep the peace.

The Magistrate has disregarded these instructions, and has by so doing rendered another reference to this Court necessary.

The view of the law taken by the Sessions Judge is correct, and in accordance with the opinion expressed by the Court on the previous references.

The new Code, Section 491, prescribes that the Magistrate cannot bind over a person to keep the peace until he has adjudicated on evidence before him. He may summon on credible information a person to show cause why he should not be bound over, but he must adjudicate upon evidence before he can pass the order to bind over. It is clear that the intention of the Legislature was that the person accused should have an opportunity of adducing evidence to exculpate himself; and it has always been the practice to allow such evidence to be adduced.

This being so, we cannot consider a notice served on the 26th on the defendant, who resided at a considerable distance, to appear and show cause on the 30th, gave him an opportunity to produce his evidence; and on this ground the Magistrate's order binding Isreepershad over to keep the peace must be set aside. The Magistrate must hear the evidence Isreepershad has to offer and adjudicate thereon: he will then pass such order as to him may appear proper.

The 9th June 1873.

Present:

The Hon'ble F. A. Glover, Dwarkanath Mitter, and C. Pontifex, *Judges*.

Accomplice—Confession—Commitment—Discharge—Jury—Oath—Act X of 1872 s. 13.

The Queen

versus

Ramsodoy Chuckerbutty, *Prisoner*.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of murder.

Baboo Hem Chunder Banerjee and Umbica Churn Bose for the Prisoner.

The Court (Mitter and Pontifex, JJ.,—Glover, J., dissenting) refused to convict in this case on the uncorroborated testimony of an accomplice who had previously been convicted of the same offence on her own confession.

Per Glover, J.—In a case triable by the Sessions Court a Magistrate has power to commit the accused to the Sessions after he has once discharged him.

Quare.—If the jury in a Sessions trial are not sworn, is the omission one which could be covered by s. 13 of the Oaths Act X of 1872?

Glover, J.—THIS case has been referred to us for confirmation of the sentence of death passed on the prisoner by the Sessions Judge.

The prisoner has appealed, and we have heard Counsel on his behalf.

His grounds of appeal are:—

(1). That the Magistrate having once discharged him, had no power to commit him to the Sessions Court afterwards.

(2). That the jury not having been sworn, their verdict was illegal; and

(3). That the uncorroborated testimony of an accomplice, such as Mussamut Ramonee was, was not sufficient for conviction; and, generally, that the evidence for the prosecution was doubtful and unsatisfactory, whilst the defence of alibi had been fully made out.

The first objection seems to me wholly untenable. No authority has been quoted in support of the contention, and if a Magistrate can take fresh proceedings against an accused and convict him after a discharge under Section 195 Code of Criminal Procedure, Exp. II, there is no conceivable reason why that Magistrate should not, under similar circumstances, commit him to the Sessions Court when the offence was triable by such Court.

* 18 W. R., Crim., 61.

With regard to the jury,—in the first place there is nothing to show that the jury were not sworn. There has been no affidavit to that effect filed, and we ought to presume that the trial was properly conducted, but were it otherwise, Section 13 of the Oaths Act (Act X of 1872) would, I presume, cover all negligence in this particular and make the verdict a legal one.

In this particular case, the question is really of no importance, as, under Section 288 Code of Criminal Procedure, we are bound to go into the whole evidence and see whether the accused has been properly convicted.

I doubt whether the witness Ramonee can be properly styled an accomplice in the sense of Section 133 of the Evidence Act. I understand an accomplice witness to be one who is either being jointly tried for the same offence and makes admissions which may be taken as evidence against a co-prisoner, and which make the confessing accused *pro hac vice* a sort of witness, or one who has received a conditional pardon on the understanding that he is to tell all he knows and who may at any time be relegated to the dock if he fails in his undertaking. Now the witness Ramonee had already been tried for this murder and had been convicted, and her evidence is in a very different category from that of an approver, whose own escape depends on the entirety of his evidence, and, it may be, on the view which the Judge takes of it.

I should be inclined to think that the evidence of Ramonee may be taken as that of an ordinary witness.

Of course it is not legally necessary that the evidence of an accomplice should be corroborated before a conviction can be had on it, but it is the usual, and undoubtedly the safest, course to insist on corroboration. In this case I am bound to say that I can find no corroboration of Ramonee's evidence. But if she may be considered in the light of an ordinary witness, I can see no reason why her evidence against Ramsodoy Chuckerbutty should be discredited. I do not forget the fact that, in her former statement when she was herself accused of the murder, she gave a different account of the way in which the actual murder was committed from what she does now; but although her evidence given in this case bears more heavily on the prisoner Ramsodoy than did her previous unsworn statement, they both make him a principal in the first degree and equally with herself guilty of killing the woman Bechee.

There is no reason that I can see for

Ramonee's accusing Ramsodoy falsely. The man was her paramour and friend, and she was, and, so far as we are informed, is on the best of terms with him. Some one must have aided in the killing of Bechee, for the medical evidence proves beyond a doubt that a woman acting by herself could not have inflicted the wounds found on Bechee's body, and have at the same time prevented her giving an alarm to people sleeping within a few feet of the cook and dhenki house in which the murder is said to have taken place. The woman Ramonee's account of the matter is reasonable. Ramsodoy is shown to have had an intrigue with her, and to have been in the habit of coming to visit her at the house. No one else is likely to have come there in the middle of the night; and no one else could have had any object in getting rid of the woman Bechee. Had the murderer been a stranger, it can hardly be supposed that Ramonee would not at once have denounced him when she raised the alarm. Instead of that, she maintained a guarded silence on being questioned, which showed pretty clearly that the man was known to her.

After much consideration, I think that the jury came to a correct finding as to the guilt of Ramsodoy, and that we ought to confirm the sentence passed by the Sessions Judge.

Mitter, J.—I am of opinion that the conviction ought not to be supported.

The only witness for the prosecution whose testimony goes to criminate the prisoner is the woman Ramonee Shekranee. This witness, however, was, upon her own showing, an accomplice in the crime; and as there is nothing whatever on the record to corroborate the evidence given by her against the prisoner, I feel myself bound to say that it would not be safe to uphold the conviction solely and exclusively on the strength of that evidence, although I am fully aware that, according to the law as it stands at present, a conviction is not illegal merely because it is based upon the uncorroborated testimony of an accomplice.

Moreover, the witness has given so many different versions of the occurrence in question that I feel little hesitation in rejecting her evidence as utterly unworthy of credit. Her first statement, which was made on the night of the murder, was to the effect that some person unknown to her had killed the deceased. Next day, when the head constable came to the spot to hold a local investigation, she produced the file with which the murder is alleged to have been

committed, and stated that she herself had done the deed; and it was not till two days afterwards that she implicated the prisoner. Then again, in her deposition before the committing officer, she tried to make out that all the blows inflicted on the deceased had been struck by the prisoner, whereas, before the Sessions Judge, she stated that she also had taken an active part in the murder. Looking at these contradictory statements, and bearing in mind that the witness is, upon her own showing, a woman of loose moral character as well as an accomplice, I feel myself bound to set aside this conviction, and I would therefore direct the immediate release of the prisoner.

Pontifex, J.—I think it would be unsafe to uphold this conviction.

The only evidence against the prisoner is the woman Ramonee Shekranee, who is none the less an accomplice because she has already been convicted on her own confession.

Under the circumstances, therefore, I do not think it would be right to convict on the uncorroborated evidence of such an accomplice.

Accordingly I concur with Mr. Justice Mitter in setting aside the conviction and directing the discharge of the prisoner.

The 12th May 1873.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

High Court—Punishment—Dacoity—Act X of 1872 s. 280—Act XLV of 1860 s. 397.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of dacoity.

The Queen

versus

Goojree Panday and another, *Appellants.*

Báboo Juggadanund Mookerjee for the Prosecution.

Case in which the High Court, under s. 280 of the Code of Criminal Procedure, having reference to the

facts of the case and looking to s. 397 of the Penal Code, enhanced the punishment passed by the Sessions Judge on a prisoner who was convicted of dacoity.

Jackson, J.—The prisoners in this case, named Goojree Panday and Jadu Sein, were convicted by the Court of Sessions at Midnapore of dacoity, and were sentenced, Goojree Panday to rigorous imprisonment for three years, and Jadu Sein to similar imprisonment for six months.

Upon the hearing of the appeal, the Junior Government pleader appeared and applied to us to exercise the powers vested in the Court of Appeal by Section 280 of the Code of Criminal Procedure by enhancing the punishment which has been awarded against the prisoners. He represented that, considering the gravity of the offence and the circumstances under which it was committed, and the place, and also the class of persons to which the complainant belonged—being a traveller to the shrine of Juggurnath—and the necessity of protecting such persons, the Court ought to see that adequate sentence is passed. This Court is empowered both as a Court of Appeal and also as a Court of Revision to enquire into the sufficiency of sentences passed by the inferior Courts. One contingency in which that power may be exercised is when the Judge recognizing the heinous nature of the offence committed, yet considers that there are circumstances which go to mitigate punishment, or make the prisoner an object of leniency. In such a case, no doubt, the High Court may enquire into those circumstances, and, although it is generally reluctant to do so, may take a different view of the discretion which ought to have been exercised, and may enhance the punishment; but there is another view of the case in which the duty of the High Court will arise, and that is where no circumstances of mitigation have been set forth, and where, without any sufficient reason, the Court convicting the prisoner has awarded a punishment which is in ordinary cases quite inadequate in respect of the offence committed. I think it is the duty of the High Court in such a case—a duty which the Legislature has in Sections 280 and 297 specially imposed upon us—to take care that the inferior Criminal Courts do not, by the infliction of lenient punishments, give as it were encouragement to the commission of serious offences. Now the offence of which the prisoners in this case were convicted is one which, under Section 395 of the Indian Penal Code, makes them liable to transportation for life, or rigorous imprisonment which may extend

to ten years; and Section 397 provides:—
 “If, at the time of committing dacoity, the
 “offender uses any deadly weapon, or causes
 “grievous hurt to any person, or attempts to
 “cause death or grievous hurt to any person,
 “the imprisonment with which such offender
 “shall be punished shall not be less than
 “seven years.” Now I find in the evidence
 of the prosecutor in this case, and that
 evidence is not disbelieved by the Judge, the
 statement “a woman who was travelling
 “with us had her foot hurt when the dacoits
 “were pulling off her anklet. A bannia
 “who was with us and a garreewan were
 “struck on the head, and hurt, and another
 “cartman was struck on the foot, and a third
 “carter had his leg broken,” which amounts
 to grievous hurt; and if the Court below had
 considered, as it might have done, all these
 circumstances, then under Section 397 a less
 sentence than seven years’ rigorous imprison-
 ment could not be passed. Looking further
 into the case, the matter appears to have
 been a planned and preconcerted robbery
 on the part of the prisoners. The prosecu-
 tor being one of a party of persons travelling
 to the shrine of Pooree halted one afternoon
 for refreshment in a village place. The
 prisoners contrived to have access to them
 and to get into their confidence in some
 degree, and doubtlessly observed where they
 kept their money, and afterwards attacked
 them when they had gone a short distance
 in their journey, at the dead of night, with
 a number of malefactors sufficient to over-
 come all resistance. I think this is a case
 in which the sentence of three years’ rig-
 orous imprisonment passed by the Sessions
 Judge on the principal accused is wholly
 inadequate, and that, under the circumstances
 of the case, a punishment less than seven
 years ought not to have been passed on him.
 The sentence is enhanced accordingly.

In respect of Jadu Sein, the younger
 member, he is considered both by the Magis-
 trate and the Sessions Judge to be a mere
 lad who was led into the crime by induc-
 ment and persuasion; and although we may
 have a suspicion that his criminality was
 something more than this, I do not think
 there are sufficient grounds for us to interfere
 with the exercise of the Judge’s discretion
 by directing that no severer sentence should
 be passed on this prisoner. In his case,
 therefore, the sentence will be affirmed as it
 stands.

The 27th May 1873.

Present:

The Hon’ble L. S. Jackson and Dwarka-
 nath Mitter, Judges.

High Court—Reference—Punishment.

*Reference to the High Court under Section
 296 of the Code of Criminal Procedure
 by the Magistrate of Purneah.*

The Queen

versus

Hurnath Sing, Constable.

In a case in which the Magistrate referred the proceed-
 ings to the High Court with a recommendation that they
 should be set aside because the sentence was inadequate, it
 was held that it is not merely because circumstances occur
 to the Magistrate which would render necessary a more
 severe sentence or a different charge that the High Court
 should interfere. There must be matter on the record
 of the case showing that the charge has been improperly
 framed, or that the sentence passed is clearly inadequate
 to the offence.

Jackson, J.—THE Magistrate of Purneah
 refers the case under Section 296 of the Code
 of Criminal Procedure with the recommend-
 ation that the proceedings of the Deputy
 Magistrate be set aside on the ground that
 the conviction is unsound and the sentence
 inadequate. The accused was prosecuted in
 the Court of the Deputy Magistrate by the
 Inspector of Police, under orders from the
 District Superintendent, upon a charge framed
 under Section 223 of the Indian Penal Code
 for negligently suffering a prisoner then
 under trial to escape. The Deputy Magis-
 trate came to the conclusion that the prisoner
 who escaped got away through the negli-
 gence of the defendant; but in consideration
 of the defendant’s previous good character,
 and that this was his first offence during a
 service of upwards of eight years, he passed
 a sentence of two months’ simple imprison-

ment. The Magistrate upon this observes that the constable "either knowingly aided the prisoner to escape, or disobeyed my orders. Had he been inside the jail outer-wall, where he ought to have been, it was a physical impossibility for the prisoner to have wrenched off the bars and doors, as he did, without the knowledge and connivance of the guard."

"I think the constable ought to have been tried either under Section 29 of Act V of 1861 or Section 222 of the Penal Code, for either of which offences he could be punished with rigorous imprisonment."

The Magistrate appears to me to misconceive the duty of the High Court on a reference of this description. It is not merely because circumstances occur to the Magistrate of the district which would render necessary a more severe sentence, or a different charge, that the High Court should interfere. There must be matter on the record of the case showing that the charge has been improperly framed, or that the sentence passed is clearly inadequate to the offence. As to the charge in this case, it was preferred by the Inspector under written orders from the District Superintendent, of Police, who must be supposed to have acted under instructions of the Magistrate himself; and we are not inclined to order a different charge to be prepared because the Magistrate now takes a graver view of the case.

Then as to the circumstances of aggravation, it is stated generally by the Inspector of Police that the Magistrate's orders are that the constable on guard should remain inside the lock-up from 6 P.M. to 6 A.M. the following morning, but the head constable, under whose immediate orders the defendant was serving, does not show that any such instructions were communicated to the defendant. He states:—"I placed the defendant on duty inside the lock-up on the night of the 1st instant," but he does not state where the defendant was on the discovery of the prisoner's escape, or that there was any special negligence on the part of the prisoner, that is, any contravention of express orders. As to the Magistrate's suggestion that the prisoner's escape had been connived at by the defendant, there is no evidence whatever. Under these circumstances it appears to me that this Court is not called upon to interfere.

The 4th June 1873.

Present :

The Hon'ble F. B. Kemp and J. B. Phear, Judges.

High Court — Jurisdiction — Suspension of Proceedings — Record — Bail — Warrant — Act X of 1872 ss. 64 & 297.

(Criminal Jurisdiction.)

Abdool Kadir Khan, *Petitioner*,

versus

The Magistrate of Purneah, *Opposite Party*.

Mr. Munmohun Ghose and Baboo Boodh Sein Singh for the Petitioner.

The Legal Remembrancer for the Opposite Party.

The High Court has jurisdiction, having regard to ss. 297 and 64 of the Code of Criminal Procedure, to take cognizance of and revise the proceedings of a Magistrate while they are in an interlocutory state of pending investigation, and may suspend such proceedings without having the record before it; it may also in such a case order bail to be taken from the person accused.

A prisoner arrested under a warrant should be brought promptly before a Magistrate, who has then no authority to further detain him in custody or to remand him to prison without some reason made manifest to him, either in the shape of sworn testimony given before him, or in some other form which can be put upon the record, and which is sufficient to justify him in sending the prisoner to prison.

Phear, J.—THREE rules, which were issued by this Court on the 12th, 19th, and 28th of last month, respectively, in the matter of one Abdool Kadir Khan, have come before us to be adjudicated upon and disposed of. Before, however, I state the exigency of those rules, I will mention a few preliminary facts. In 1870 and 1871, or during a portion of those years, Abdool Kadir Khan was officiating head clerk of the Purneah Collectorate in the place of one Roodro Chunder Mullick. Roodro Chunder Mullick appears to have resumed his duties somewhere towards the end of the year, and, shortly afterwards, preferred three charges of embezzlement and two of forgery against Abdool Kadir Khan. These charges were enquired into by Mr. Weekes, who was at that time the Joint Magistrate of Purneah, and dismissed by him. This occurred in November 1871. Subsequently, however, the Sessions Judge took up the matter, and directed the Magistrate to commit Abdool Kadir Khan for trial upon these charges, and pursuant to this direction of the Judge Mr. Wyrer, who then had succeeded Mr. Weekes

as Joint Magistrate, issued a warrant of arrest; and Abdool Kadir was arrested under that warrant, I think in October 1872, and was committed for trial. He was tried at the Sessions Court and convicted on the 13th of January 1873. He was then sentenced by the Judge to ten years' rigorous imprisonment and to pay a fine of Rs. 1,000, or in default of payment to suffer rigorous imprisonment for a further period of two years. After Abdool Kadir Khan had been committed for trial by Mr. Wyer, Mr. Kemble, who was then and still is officiating Magistrate and Collector of Purneah, wrote a letter on the 30th of December from himself as Collector to himself as Magistrate. The letter runs in these terms:—"To the Magistrate of Purneah; Sir, 'I have the honor to forward to you here-with in charge of my head clerk, Baboo Sreenath Banerjee, the following papers 'connected with the late embezzlement by 'Syed Abdool Kadir Khan at present in 'custody in the Purneah jail, and who will 'be now charged with further embezzlement. 'I shall be obliged if you will issue warrants 'for his arrest in case he should not be 'convicted on the charges on which he is to 'be tried on the 6th proximo.

"The papers named above are—

"1st.—An abstract marked A, drawn up by Mr. Worgan, dated February 27th, 1872, showing that Abdool Kadir, between September 1870 and May 1871, cashed certain bills as subdivisional contingent and income-tax bills for larger sums than were billed for by the subdivisional officers, and remitted to those officers the smaller amount only. This charge will be proved by the bills cashed, the copies of the original bills from Kishengunge, and the copy bill-book from Arrariah, and by the covering letters and the cheque register, all of which are sent. These papers will show that fraud has been committed, and my head clerk is instructed to prosecute Abdool Kadir, who cashed these bills, under Section 409 or other cognate Sections.

"3rd.—With reference to item 9 in Mr. Worgan's list, a charge of forgery will also be laid, as the original bill for Rs. 52-5-7 was not in this case destroyed, but was altered to Rs. 76-5-7 by manifest erasures. This charge will fall under Chapter XVIII of the Penal Code.

"4th.—Any of my officers will be ready at any time to attend your Court to prove the documents now filed."

We have been informed that the schedule or papers annexed to this letter contain as many as twenty-four distinct items of charge. Mr. Kemble the Magistrate, having been in this way informed by Mr. Kemble the Collector of the fact of a criminal offence having been committed by some one within his jurisdiction, took cognizance of it; and having been further led, I suppose by the same means, to suspect that Abdool Kadir was the offender, he dealt with the matter as Magistrate under Section 142 of the present Procedure Code, and then made over the case for enquiry to Mr. Wyer, the Joint Magistrate, and the result was that Mr. Wyer committed Abdool Kadir for trial on three out of the twenty-four charges mentioned or referred to in the letter. I feel myself obliged to say in passing that this really seems to me a very pitiful effort at disguising the fact that Mr. Kemble was in this matter the real prosecutor in his capacity of Collector, the prosecutor of Abdool Kadir Khan upon the charges contained in the letter of the 30th of December; and it would have been much more straightforward, to say the least of it, if he had frankly avowed himself prosecutor and laid a complaint before the Joint Magistrate in the usual manner. Abdool Kadir was tried upon these charges, and convicted by the Sessions Court on the 11th of March 1873, and was further sentenced, in addition to the sentence I have before mentioned, to a term of seven years' rigorous imprisonment. Against the convictions and sentences of the 30th of January and 11th of March respectively, the prisoner appealed to this Court, and was acquitted in the one case on the 25th of April, and in the other case on the 26th of the same month. An order for his immediate discharge from custody, so far as imprisonment under these convictions and sentences was concerned, was at once sent down to Mr. Kemble, the Magistrate of Purneah, who appears to have received the order in the afternoon of the 28th April. The Magistrate did not, however, promptly release the prisoner. Before taking any step towards doing so, on the 28th, in his capacity of Collector he sent a letter to Mr. Wyer, the Joint Magistrate, which runs thus:—"Sir, 'as I hear that Abdool Kadir has been 'released by the High Court from the 'sentence recently imposed on him by the 'Sessions Court, I have the honor to request 'that you will go on with the other charges 'noticed in my letter No. 1933, dated 30th 'December 1872, to the address of the 'Magistrate. I have the honor to be,' &c.

Upon this letter is endorsed by Mr. Wyer, "a warrant will at once issue against Abdool Kadir Khan under Section 409, and "be given to the Court Inspector to be "served." It also appears that, on the same day, Mr. Wyer issued a formal warrant according to the terms of this endorsement. This having been done, Abdool Kadir Khan was brought up from the jail before Mr. Kemble as Magistrate, and then told of his acquittal by the High Court and of the order for his release from jail. Mr. Kemble also at the same moment turned round to the Court Inspector who was present, I need hardly say not by accident, and said to him:—"Has Mr. Wyer given you a warrant." The answer was in the affirmative. Mr. Kemble then said:—"Take him back to jail;" and back to jail Abdool Kadir was taken. No warrant of commitment to jail or written order of remand was made out, nor was the prisoner taken before the Magistrate who had issued the warrant of arrest according to the exigency of the warrant. This is on the 28th. On the 29th the Court Inspector becoming, probably not without good reason, a little anxious that a written warrant of commitment should be made out, endorsed upon the original warrant of arrest this memorandum:—"Sir, yesterday at "6 P.M., prisoner Syed Abdool Kadir was "released by order of the High Court, "Calcutta. At the moment he was under "this warrant arrested, and by order of the "Magistrate of this District, sent to hajut. "But owing to the lateness of the hour, the "purwannah for hajut was not sent. By "this report, therefore, I beg to solicit that "an order may be passed by the huzoor for "giving a purwannah for hajut regarding "the said defendant." Mr. Wyer endorsed under this the same day:—"That a "purwannah for hajut be given, and that the "record in the matter of Abdool Kadir, "made over by the Magistrate, be, by a "proceeding, sent for from the Sessions "Judge;" and there is further endorsement to the effect that a proceeding had been sent. This, I understand, is the endorsement which constituted the written order of commitment. On the 1st of May, the Joint Magistrate issued a further order in this matter. It seems that on that date, Mr. Kemble wrote to Mr. Wyer in these terms:—"With reference "to the case of Abdool Kadir Khan now "pending before you, I have the honor to "request a postponement for one week "until I receive the judgment of the High "Court in the cases previously decided."

It does not appear that the prisoner was at this time brought before Mr. Wyer, or indeed that he was taken from prison before any Magistrate after the verbal commitment of Mr. Kemble on the 28th of April. Until the 8th May, a date to which I shall presently come. Mr. Wyer endorsed upon this application for adjournment made by Mr. Kemble, "The case will be postponed to the 8th," and on the same day he made out a formal order of remand until the 8th of May. It must be remembered that, up to this time, no evidence whatever had been taken, and we have not been made aware that there were any reasonable grounds, or any ground whatever, for a remand other than the letter of Mr. Kemble written to Mr. Wyer which I have just now read; and I suppose that the sole reason, the only ground upon which the Joint Magistrate detained the prisoner in hajut, was the ground afforded by such suspicion as was lurking in his mind in consequence of the original letter sent by Mr. Kemble to him on the 28th of April, strengthened if it is possible to conceive it to be strengthened by this letter of Mr. Kemble written to him on the 1st of May asking for an adjournment. It is perhaps not to be wondered at that, in this state of things, the prisoner desired to see the warrant of arrest in order to ascertain, if possible, the offence with which he was charged, and the matter for which he was held in custody. He accordingly petitioned Mr. Wyer for a copy of the warrant of arrest; this application was refused. He then petitioned Mr. Wyer to let him have a copy of the order of refusal; this application also was refused. He then made an application to be admitted to bail, not altogether an unreasonable one considering that several days had already passed, and, yet from the first, no evidence whatever had been taken, and indeed no specific accusation or charge made against him. This application was again refused. Abdool Kadir then applied to this Court by petition upon the foundation of the material facts which I have just been relating, set forth in an affidavit, and upon this petition and affidavit the rule of the 12th of May issued, which in substance directed that the record and processes and papers in the case should be sent up to this Court; that the proceedings in the matter should be stayed in the Magistrate's Court until further order of this Court; and that, in the meanwhile, the prisoner should be released upon certain security (which was specified in the rule), for his appearance in the Magistrate's Court

when called upon. This rule, I believe, reached Mr. Kemble on the 14th of May. The Magistrate acted upon this rule so far as to admit the prisoner to bail upon recognizances conditioned for his appearance every day in the cutcherry. At the same time the Magistrate wrote a letter to the District Superintendent of Police in these words:—
 “Sir, Abdool Kadir has just been released by orders of the High Court on bail of Rs. 500 only. I think it extremely probable that he will try to escape and forfeit his bail. I therefore request that you will instruct the Police to watch his movements, and to report to me if he should be discovered leaving Purneah. He is bound to present himself to me every morning.” Upon entering into the recognizances conditioned in this manner, Abdool Kadir was released. The next day, the 15th, he presented himself at the cutcherry in obedience to the terms of the security bond, and Mr. Kemble, as I understand, then directed that he should be taken into custody by his nazir. The nazir accordingly arrested him, detained him in his personal custody all day, and finally Mr. Kemble ordered that he should be taken to the civil jail and confined there. He professed to do this of his own authority as Collector under the provisions of Regulation XVIII of 1817. No evidence was then taken, nor, I believe, was any evidence taken in the presence of the prisoner at any time during the period of his incarceration in the civil jail, which continued for seven days. Not unnaturally the prisoner Abdool Kadir did not consider this behaviour of the Magistrate towards him as amounting to a complete carrying into effect of the orders of this Court given in the rule of the 12th of May, which among other things, certainly directed that he should be released. So he presented a second petition, fortified by an affidavit, to this Court, and on the 19th of May a second rule was issued calling upon Mr. Kemble to show cause why he did not carry out the order of this Court, which was involved in the rule of the 12th of May. Before this second rule reached Mr. Kemble, he had, it seems, been informed by the Commissioner that the imprisonment of Abdool Kadir in the civil jail was altogether illegal, because the Regulation under which he professed to act had been repealed, and he was instructed by the Commissioner to lay a complaint in his own person against Abdool Kadir before the Magistrate, and to proceed in the regular way for the prosecution of that complaint. He, therefore, released the

prisoner from the civil jail on the evening of the 21st of May. On the 22nd he made a complaint on oath before the Joint Magistrate Mr. Wyer, upon the footing of which Mr. Wyer issued a warrant of arrest, and Abdool Kadir was the same day again arrested upon the charges which were supposed to be embodied in this last-mentioned complaint of Mr. Kemble. Upon his arrest a remand order was made out, by which he was committed to hajut to appear again before the Magistrate on the 30th of May, but it has not been shown to us that there was any evidence, and I believe I may take it that there was none, upon which this order of remand to prison was made out. The prisoner then prepared a third petition to this Court representing the facts which I have just mentioned by affidavit, and a third rule was issued to Mr. Kemble on the 28th of May requiring him to send up the record of this second case as well as the first, and to release the prisoner upon bail of himself Rs. 1,000, and two sureties of Rs. 500 each. In the meanwhile Mr. Kemble had made a second deposition before Mr. Wyer, not in the presence of the prisoner, the purpose of which it is not easy to apprehend unless it was to make the original complaint, upon which the prisoner had been already arrested; namely, on the 22nd May, more clear and more complete than it was before. Afterwards, again Mr. Kemble corrected both these depositions by what I may term a letter of appendix written to Mr. Wyer, and I believe that that letter has been placed upon the record by Mr. Wyer. Thus it has come about that the three rules which I first mentioned have been issued by this Court to Mr. Kemble, and are now before us for adjudication.

I will now return to the matter of the first rule. The learned Legal Remembrancer objects that the rule was issued by this Court without jurisdiction. He has put his objections very clearly in a detailed form, but I think I may group them somewhat and say that they substantially amount to: first, an objection that this Court has no jurisdiction to revise the proceedings of a Magistrate while they are in an interlocutory state; second, that it has no jurisdiction to suspend such proceedings either at all, or at any rate without having the record before it; and, third, that it has no jurisdiction in such a case to order bail to be taken, because the Sessions Court has exclusive jurisdiction in that matter by virtue of Section 390 of the Criminal Procedure Code; and also because in this particular case

circumstances justifying the release of the prisoner on bail did not exist, the offence with which he is charged being, according to his own admission, a non-bailable offence, and the conditions of Section 398 not being satisfied. Now it appears to me that Section 297 of the Criminal Procedure Code furnishes an answer to all these objections. The first Clause of that Section is as follows:—

“If in any case either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit.”

If that Clause stood alone, clearly it would exhibit no limitation whatever in regard to the stage of the judicial proceeding in which power is given to the Court to call up and revise these proceedings. The learned Legal Remembrancer argues, however, that the remaining Clauses of that Section, inasmuch as they are all directed to cases where there is a record, and where a final order, or an order which in some sense may be taken, as a final order has been passed, must be construed by implication to put a limitation of the kind which he contends for upon the general words of the first Clause. It seems to me that we should be wrong in coming to a construction of this sort, even looking upon the words of Section 297 alone; but when further we have regard to Section 64, which gives this Court the power, whenever it appears to it, that its order will promote the ends of justice, and so on, to “direct the transfer of any particular criminal case or appeal, or class of cases or appeals, from a Criminal Court subordinate to its authority, to any other such Criminal Court of equal or superior jurisdiction, or may order that any offence shall be enquired into, or tried in any district or division of a district, other than that in which the offence has been committed, or that it shall be tried before itself;” when we have regard, I say, to these provisions of Section 64, it is quite clear, I think, that the Court must have power to take cognizance of and revise proceedings before a Magistrate while they are still in the interlocutory state of pending investigation; or otherwise there would be no reason why the Legislature should in this way give the Court express power to remove a case from one tribunal to another for the purpose of carrying on or continuing the investigation of it. I believe that the objection of the learned Legal

Remembrancer on this point is made now for the first time, and at any rate the Court has since the date when this new Criminal Procedure Code came into force, been almost daily, I may say, acting upon the general power of revision which hitherto has been supposed to be conveyed by this first Clause. And if it has power by this Clause, as it seems to me clear that it has, to call up to itself proceedings while they are in the condition of the preliminary stage of investigation for the purpose of correction and of giving proper directions for the conduct of the investigation, it must be incidental to that power that the Court should be able to suspend the proceedings, for it would be a manifest absurdity to my mind that the Court should be empowered by the Legislature to call up the record and the proceedings in a case for the purpose of looking at them, revising them, correcting material error, and putting them upon a proper footing of investigation, but yet that the Court should have no power to stay the proceedings of the Subordinate Court which require to be set right. It is, no doubt, a very forcible objection on the part of the learned Legal Remembrancer that a step of this kind should not be taken by this Court without inspection of the record; and I readily concede this much to him, namely, that the Court ought not in any, except extreme, cases to interfere with the Magistrate's proceedings until it has the record before it. But I entirely deny that it has not the power to do so. If the Court were altogether unable to take such a step without having the record before it, the non-existence or non-production of a record would really effect a nullification of this Court's powers of revision in some cases which I could mention, and which by their nature would be cases in which it was most necessary that this power should be exercised. In this very case, which is now under our consideration, before the day when Sreenath Banerjee was examined as a witness, there was nothing which could be called a record, and, if the Magistrate chose to allow that state of things to go on and to keep the prisoner in custody, without in fact taking any proceeding whatever, the result would be that, while the unfortunate prisoner might be illegally detained in jail for months, there would be no material in the shape of a record to be put before the Court, upon which its action could be invoked. And yet obviously such a case as that would be one which would more require the intervention of this Court

for the purpose of furthering the ends of justice than almost any other which could be instanced. In truth, the absence of anything to record might afford the strongest possible ground for the interposition of this Court. But it further seems to me that the words of Section 297 entirely dispose of this question. By them the Court is expressly empowered to pass such judgment, sentence, or order as it thinks fit in any case called for by itself (*i.e.*, where the record is sent for) or which comes to its knowledge; and this last must, I apprehend, be any case the facts of which are brought to the knowledge of the Court in any sufficient manner, whether by the record or otherwise. It is, however, I need hardly say a rule of the Court not to suspend proceedings, and not to issue final orders to a subordinate Court until it has the facts manifested to it in the most sure and certain shape, namely, the shape which the record itself affords, if possible; and nothing is more common when the summary interposition of this Court is invoked, than for this Court, in the first instance, to say we can only at this stage send for the record, and when the record comes before us we shall see how the facts stand. But, as I remarked during the course of the argument, the present case seemed to us a very exceptional one. We had facts before us positively sworn to, with regard to which it was not likely that perjury would be committed; and if these facts were accurately stated, they were such as rendered it incumbent upon us at once without delay to afford the petitioner the relief which he asked. It turns out that these facts were perfectly accurate, and I will take the opportunity here to say that the representation of facts which has been made to this Court on the three different occasions by Abdool Kadir Khan in his several petitions and in the affidavits made on his behalf have proved in our judgment to be throughout most fair, most candid, and most accurate, and I think at any rate in the final disposal of these rules he ought to have such benefit as he can properly derive from the truthful attitude which he has taken up in this matter. I do not think it is necessary for me to add further reasons why, if we have the power to bring up these proceedings, we must also have the power to suspend action in the Court below pending our enquiry.

We come to the third objection of the Legal Remembrancer, to the effect that the order directing the Magistrate to admit Abdool Kadir to bail was made with-

out jurisdiction. I find the answer to that objection in the same Clause of Section 297 which I have already referred to. This Court is empowered by that Clause to pass such judgment, sentence, or order thereon as it thinks fit, and it must in any case at least be fit and proper that this Court should give the Magistrate such directions as to his action as will lead him to do that which he ought to have done without the directions of the Court. Now, unquestionably at the time when the order to admit to bail was sent down by this Court, although it is said the offence of which Abdool Kadir was accused was a non-bailable one, the Magistrate had power to remand the prisoner, and during the period of remand to admit him to bail. In fact, as matters were represented to us, and as they now stand unimpeached, it was his duty under Section 389 to have admitted the prisoner to bail at the time when the prisoner applied to be admitted to bail. When it is said that the jurisdiction which is given to the Sessions Court by Section 390 in such a case as this to admit the prisoner to bail has the effect of excluding the power of the High Court, it seems to me that some misapprehension at any rate with regard to the two cases must exist. The case can only be brought before the Sessions Judge for bail upon the footing upon which it stood before the Magistrate, and although as it happened in this particular instance, the facts are such as rendered it the duty of the Magistrate to admit the prisoner to bail, and therefore such as would make it the duty also of the Sessions Judge on appeal to direct that he should be admitted to bail, yet, generally, the case before the Magistrate, as regards the question of bail, and the case in this Court may materially differ. When the case has been brought up to this Court under the powers given by Section 297, and the day for further investigation and enquiry in the Court below has thereby necessarily been postponed for a considerable period, an additional element, a further ingredient, has been added to the case which would not have been in it had it been taken in the ordinary course in the Sessions Court; for it must be, as it seems to me, a most important matter for consideration, in regard to the propriety of admitting the prisoner to bail that this Court has found it necessary to postpone the day of further enquiry, and thereby considerably enlarged the period of the prisoner's intermediate imprisonment if he is to be detained in prison in the meanwhile. This I repeat is a most important element to be considered

when the propriety of releasing upon bail is in question, and the addition of it may serve to turn the scale in the prisoner's favor when this Court is called upon to determine what order is fit and proper to be passed under Section 297. On the whole, then, it seems to me that the objections which the learned Legal Remembrancer made to the rule of the 12th of May fail him. I think that the rule is good and valid, and that it was the duty of the Magistrate to comply with it. It is virtually admitted on the facts that he did not comply with it, for he certainly did not release Abdool Kadir. It seems to me impossible to say that the admitting him to bail upon recognizances conditioned in the way in which the recognizances in this case were conditioned is the same thing as releasing the prisoner. I understood the learned Legal Remembrancer in his argument of the day before yesterday to appeal to Section 391 as an excuse for the conduct of the Magistrate, and to urge that that Section did afford a ground for a possible misapprehension on Mr. Kemble's part as to the intentions and orders of this Court involved in the direction to release on bail; and this, I take it, is pretty nearly as much as admitting that the Magistrate did not carry out the orders of the Court as they were intended to be carried out. I do not think I need dwell upon the terms of Section 391, because it seems to me that, if any one reads that Section with an intelligent attention, he will see that the meaning of it is, not that a man when enlarged should be given a qualified or abridged liberty, but that it should be competent to the Court to make the recognizances extend to ensuring his attendance at more than one stated time or contingency, to meet the purposes for which it was necessary that he should be bound to attend the Court; as for instance, from day to day during the investigation or trial. The learned Legal Remembrancer also very forcibly put before us that there could be no intention on the part of any subordinate officer to disregard the orders of this Court, because he has an overpowering incentive to do his duty in the certainty which he must perceive of the action which would be taken by the Executive Government in the event of his not doing it. If such motives as those for right action are to be referred to, I would also say that this Court has the power of vindicating its own authority whenever that authority is intentionally disregarded, and if it sometimes becomes necessary or expedient so to do

when private persons are the offenders, such a course would be still more necessary and expedient when judicial officers subordinate to it deliberately disobey its orders. If such a case should ever occur, as I trust and believe it will not, it seems to me that it would constitute such a public scandal upon our administration of justice here as would demand the immediate intervention of this Court of its own authority, and I doubt not that such intervention would be effected. But we entirely accept the learned Legal Remembrancer's assurances that Mr. Kemble in this case had no intention whatever of disobeying the orders of this Court, or of doing any act of disrespect towards this Court. It is, I think, unfortunate that he was, if I may use the expression, not so entirely and thoroughly loyal towards superior authority in the first instance as he might have been; because it is clear that had the case to which the rule of the 12th of May was directed been sent up to this Court, and Abdool Kadir released on bail without delay, the further complication of the matter would have been avoided, and the subordinate Court would have been set right most easily without that inconvenience, even to Mr. Kemble himself, which the course adopted by him has certainly brought about.

The third rule in some sense disposes of itself, and we have now before us both the record of the first case and the record of the second case preferred by Mr. Kemble against Abdool Kadir Khan. The last question then for us to consider is what is to be done in the matter of these two cases. The petitioner has asked that we should transfer the further investigation of them to some other Court, and I feel myself most reluctantly forced to say that, in view of the events which have occurred, I think both Mr. Kemble and Mr. Wyer, although, as I have already said, I acquit them altogether of any intention other than the intention to do their duty towards this Court and as public officers, have nevertheless come to be placed in a false position. As I remarked at the outset, the action which was taken by Mr. Kemble in the beginning was the action of a prosecutor. Had he openly prosecuted the case which he set up against Abdool Kadir before an independent Magistrate, I doubt not that everything would have gone well. As it was, he made some show of handing the matter over to another officer, but he did not do so in reality. I have already commented upon his letter of the 30th of December from himself to himself. On the 28th of

April he directs the Joint Magistrate to issue a warrant of arrest, and the Joint Magistrate does so, not in the exercise on his own part of an independent judicial discretion, but because he is asked to do so by the Magistrate of the District upon the footing of a letter which that Magistrate wrote to him, or brought to his notice. The prisoner upon being arrested is not even then brought up before the Magistrate who issued the warrant of arrest, as he ought to have been in due course of law. Nothing, I think, can be clearer now than that the purpose of a warrant of arrest has been fulfilled when the prisoner is brought before the Magistrate who issued that warrant, or any other Magistrate qualified to act for him, and further that it is the duty of the person who receives the warrant and is charged with its execution to bring the prisoner before the Magistrate without any unnecessary delay. The warrant of arrest is issued, in the ordinary course, either upon information laid by a third person before a Magistrate, or by the Magistrate of his own authority, under Section 142 of the Code, but still, when the prisoner is once arrested under it, the remaining course of proceeding which is to be pursued is the same in both cases; the prisoner should be brought promptly before the Magistrate, and the Magistrate has then no authority to further detain him in custody or to remand him to prison without some reason made manifest to him, either in the shape of sworn testimony given before him, or in some other form which can be put upon the record and which is sufficient to justify him in sending the prisoner to prison there to be detained for a limited period before further examination; a period which is never in any case to exceed fifteen days. Nothing of the kind occurred here, and it is most important, I think, to bear this in mind because it goes to show that Mr. Wyer has not, almost from the beginning to the end, or at any rate for the greater portion of the case, given himself ever an opportunity of exercising a judicial discretion upon matters of evidence before him. In making the first order of commitment to Hajut, *i.e.*, the first remand order, he acted on the memorandum of the Court Inspector only, and in making the more formal remand order which he issued on the 1st of May, he acted solely upon the request of Mr. Kemble without any other reason manifested to him in any form whatever, as I understand, why he should so exercise his judicial discretion. The consequence was that from the 28th of

April until the 8th of May, *i.e.*, for ten days, Abdool Kadir was detained in custody without any legal cause, simply at the instance of Mr. Kemble, as it seems to my judgment. On the 8th of May, the evidence of Sreenath Banerjea was taken. I will assume that that evidence was sufficient to furnish a ground for the further detention of the prisoner. In order that it should do so, it ought to have a tendency to show that the prisoner had committed some specified offence, and that further evidence would be likely to be obtained by a remand. I am not sure that there is even now after Sreenath Banerjea has given his evidence any sufficient material on the record to indicate what offence has been committed by any one, or further to indicate that Abdool Kadir is the person who committed it. The warrant of arrest was issued clearly in ignorance of any evidence bearing on the point, for it did not in any degree specify the offence of which Abdool Kadir was accused: it merely stated generally that he was to be arrested for an offence under Section 409. A vague statement of this kind, I may remark, is by no means a compliance with the provisions of the Criminal Procedure Code, which for obvious reasons directs that the offence shall be specified in the warrant. What information could possibly be conveyed to an ignorant prisoner by such a statement? I will not pay Mr. Wyer the bad compliment of supposing that he ever thought it was sufficient. The fact was that he could not make it more specific: and this fact affords the key to the whole of the irregularities committed. After the 14th, Abdool Kadir's imprisonment for seven days which was effected by Mr. Kemble was clearly without jurisdiction and without legal cause. Mr. Kemble was still not in a position to make a definite accusation against Abdool Kadir, and nevertheless was still struggling by any means, regular or irregular, to keep him in his grasp. And again when we come to the second case preferred by Mr. Kemble upon alleged new grounds against Abdool Kadir, we find that, although the original warrant of arrest was probably founded upon sufficient sworn information, yet the subsequent remand from the 22nd until the 30th was an order again made by Mr. Wyer without any reasonable ground, or indeed any cause whatever. Thus it appears to my view very plainly that Mr. Kemble has been acting in this matter from first to last in the first case as well as the second (calling them two cases though they really are one) as the prosecutor

of Abdool Kadir Khan. It seems to me further that in neither the one case nor in the other is he yet in a position to specify in any degree the particular charge or charges upon which he is prepared to accuse Abdool Kadir, and in neither case is he yet prepared to offer evidence upon which he can ground a charge against him. It is probably pretty certain that there were very large defalcations in the Purneah Collectorate treasury in 1870 and 1871; and, no doubt, Mr. Kemble believes that Abdool Kadir was the person who embezzled a good deal of the money; but he cannot yet make any particular accusation against him, and is uncertain what evidence of his guilt will ever be forthcoming. In this situation Mr. Kemble has, as it seems to me, most anxiously from the time when he came to know of the judgment of acquittal passed by this Court, endeavoured to hold Abdool Kadir as it were under his hand while he is making those enquiries and investigations which he believes will enable him some day to make a definite charge, and to support it with evidence against Abdool Kadir. He has used the authority of Mr. Wyer as Joint Magistrate in aid of his purpose to keep Abdool Kadir within arm's reach in the manner I have described. It further seems to me that, during all those proceedings, Mr. Wyer has lent himself to Mr. Kemble's purposes, and has refrained from exercising a real judicial discretion of his own. He has arrested Abdool Kadir at Mr. Kemble's dictation, and detained him in prison without legal cause at Mr. Kemble's request, and he did this last in the so-called second case when he must have had full notice of the high-handed character of Mr. Kemble's conduct in confining Abdool Kadir for a week in the civil prison. It is with this view, that I say it appears to me, that both Mr. Kemble and Mr. Wyer have come to be in a false position in this matter, and that I think it will not be right or fair either to themselves or the prisoner that the further enquiry into and investigation of these two cases should be carried on judicially by either of these two gentlemen.

I believe I may say that we are agreed upon taking the course in this case which was taken in the precedent afforded by the Bancoorah case,* IV Bengal Law Reports, page 1, Appendix. There is, no doubt, for the

reasons which were put forward by the learned Legal Remembrancer the day before yesterday, that it would be exceedingly inconvenient, and probably would cause great expense and delay, if this case were sent to another district for enquiry and trial. We desire to avoid this consequence if possible; and accordingly we think that it will be best that our views with regard to the necessity of removing these cases from the cognizance of Mr. Wyer and Mr. Kemble should be communicated to the Government of Bengal, in the hope that the Government may depute a qualified officer to Purneah to entertain these cases in the place of either of those gentlemen. And upon being certified that such deputation has been made, we will make an order for the transfer of the cases to the officer so appointed, for due enquiry and investigation. We think further that any other case which Mr. Kemble may wish to institute against Abdool Kadir in his capacity of Collector as prosecutor, arising out of these Collectorate defalcations, should be also preferred before this official, and be proceeded with of course as promptly as possible. Should the Government of Bengal not see good reason to make an appointment of this kind, we shall feel obliged to transfer the case to another district. We, therefore, make no order at present, but simply adjourn the case for one month. The accused will remain on the present bail until called upon to answer to the charges by the local Court.

Kemp, J.—I entirely concur in the judgment which has just been delivered by Mr. Justice Phear. It has occurred to me to have to sit for a short time with that learned Judge during the illness of Mr. Justice Ainslie, and during that period two cases which had been tried by two Sessions Judges of Zillah Purneah came before us on appeal. In both those cases the accused Abdool Kadir Khan was concerned. In one of those cases Mr. Justice Phear passed a somewhat severe censure upon the conduct of the Sessions Judge, Mr. Lockwood, and I entirely concurred in that censure, although I did so with great regret. I am of opinion, an opinion deliberately arrived at, that the whole of the proceedings in this case, so far as they have gone, are most discreditable to the judicial authorities of Zillah Purneah. It appears that in 1870-71 certain defalcations took place in the Collectorate of Zillah Purneah. I understand that the Government have recouped themselves by directing

* 18 W. R., Crim., 1.

the then Collector Mr. Worgan to make good the sums embezzled by deductions from his salary. Subsequently it was necessary to cast about for a victim upon whom to saddle these defalcations, and various charges, the subjects of the former trials and of the proceedings now before us, were laid against the accused Abdool Kadir Khan. This person was at the time of the defalcations the head clerk of the Collectorate. Ordinarily speaking, and I speak from my own experience which is not a limited one in Collectorate matters, a person in such a capacity, namely, that of head clerk, would not be entrusted with any money belonging to Government, and therefore it must have been under very exceptional circumstances that Abdool Kadir Khan could ever have had anything to do with money matters in the Collectorate. We have been told that Abdool Kadir was a great favorite of the late Collector Mr. Worgan, and although during that gentleman's presence at the station of Purneah before he went to England on furlough, proceedings were taken against Abdool Kadir before Mr. Weekes, who was then the Joint Magistrate of Purneah, proceedings taken some time after the defalcations were discovered, and as already observed, at a time when Mr. Worgan was present at the station, who having himself been called upon to make good the amount of these defalcations had a personal interest in fixing the responsibility upon somebody else, even then, and upon picked charges, the final result is that the accused has been acquitted. After the double acquittal by this Court in the trials above alluded to, the first being conducted by Mr. Lockwood and the second by Mr. Ward, further proceedings have been taken which have led to the three rules which are now before the Court.

It is quite unnecessary for me to add anything but a few words of entire concurrence with what has fallen from Mr. Justice Phear with reference to the objections taken by the Legal Remembrancer as to the jurisdiction of this Court.

It appears to me clear that Mr. Kemble, the Magistrate, has disobeyed the orders of this Court, but I am happy to find that my learned colleague is of opinion that there has been no want of *bona fides* on the part of Mr. Kemble in this matter. I must say, speaking for myself, that Mr. Kemble's conduct, more particularly with reference to the double capacity in which he

has acted in this matter, endeavouring to evade compliance with the orders of this Court as Magistrate by turning himself for the nonce into a Collector, and then acting under an old Regulation which has been repealed, is not altogether consistent with an earnest intention to carry out our orders. I do not wish, however, to press this matter further, nor in any way to dissent from the judgment which has just been delivered by my learned colleague. In the matter of the transfer of the case to another Court, I admit that this is a step which this Court ought not to take except under extraordinary circumstances and on very clear and satisfactory grounds. I think it is undoubtedly a slur upon an official of any grade when proceedings which have been instituted before him are removed from his Court to another Court; but if the interests of justice require that such a step should be taken, it is the duty of this Court to do so without any reference to what the feelings of an official may be on receiving the orders of this Court directing him to transfer the case to another officer. Such proceedings of course carry with them an indication that this Court can have no longer any confidence in that officer in the matter of his further proceeding in the case under consideration; but as I have already said the interests of justice must be first looked to.

In this case I do not think it right that Abdool Kadir, after what has passed, and looking to the former proceedings which have taken place in this case and to the attitude of defiance in which the local authorities have placed themselves in carrying out the orders of this Court, or rather in not carrying out its orders, should be tried either by Mr. Kemble or by Mr. Wyer. I do not think, and I say so advisedly, that Abdool Kadir would obtain a trial entirely free from bias before either of those officers.

It is, therefore, with considerable reluctance and regret that I am obliged to concur in the transfer of this case, as also in the censure which has been passed upon the local officers by my learned brother Mr. Justice Phear.

The 12th June 1873.

Present:

The Hon'ble W. Markby and E. G. Birch,
Judges.

High Court—Jury—Right to begin—Confession
—Act X of 1872 s. 263—Act I of 1872
s. 29.

Reference to the High Court under Section
263 of the Code of Criminal Procedure
by the Sessions Judge of Moorshedabad.

The Queen

versus

Ram Churn Ghose, *Prisoner.*

Baboo Gooroo Dass Banerjee for
the Prisoner.

The Junior Government Pleader for the
Prosecution.

In a case referred to the High Court under s. 263 of the Code of Criminal Procedure because the Sessions Judge differed from the verdict of the jury, the High Court held that it was for the Government, the appellants, who asked for a conviction, to begin and satisfy the Court that there was a case calling upon the prisoner for an answer.

The Court, on a consideration of the evidence, set aside the verdict of acquittal come to by a majority of the jury, holding that a confession made by the accused before the Assistant Magistrate was good, such confession, even if obtained by deception, being admissible under s. 29 of the Evidence Act I of 1872.

Markby, J.—In this case the prisoner Ram Churn Ghose was tried in the Sessions Court of Moorshedabad before the jury upon a charge of murder under Section 302, and of culpable homicide under Section 304, of the Indian Penal Code; and, in the course of the trial, a count was added by the Sessions Judge under Section 304A for homicide by rashness or negligence. The jury consisted of seven persons, and six out

of the seven returned a verdict of not guilty upon all the charges, but the seventh jurymen found the prisoner guilty of culpable homicide not amounting to murder under the second charge. The Sessions Judge does not differ from the verdict of the jury upon the first charge, but disagreeing with the verdict of the majority on the second charge, and agreeing with the verdict of the juror in the minority, has referred the case to this Court under the provisions of Section 263 of the Code of Criminal Procedure, which provides that "if the Court disagrees with the verdict of the jurors or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court." When this case came up to this Court a day was fixed for the hearing of it, and notice to the prisoner and to the Magistrate was given in the usual form, but no one appearing on behalf of the Government for the prosecution, we directed the case to stand over for a week in order to ascertain whether or no the Government wished to appear in the case. When the case came on again for hearing, the Government pleader appeared, and inasmuch as Section 263 directs that this Court shall deal with a case submitted in this manner as with an appeal, we held that the appellant in this case was the party who asked for a conviction, and that he must begin and satisfy us that there is a case calling upon the prisoner for an answer.

We have now heard the vakeels on both sides, and have to decide whether or not the prisoner ought to have been convicted upon the evidence given in the Sessions Court. We entirely agree with the observations which have been made in similar cases by other Division Benches that we should not interfere with the verdict of a jury unless it were established in the clearest possible manner that they had wholly miscarried in their conclusion upon the case. They are the constituted tribunal upon questions of fact in the districts where the jury system has been introduced, and it will be wholly destructive of that institution if the greatest possible confidence is not placed in them. But there are undoubtedly cases in which the jury may miscarry, and after a very careful consideration of the whole case before us we are satisfied that this is one of them. We have been very greatly assisted in coming to a conclusion upon this case by the thorough sifting which it has received in the Sessions Court. All the witnesses have been very minutely examined, and all the circumstances

which could assist the jury or ourselves in coming to a conclusion have been elicited. The short facts of the case, as far as it is necessary to state them, are that the prisoner on the night in question was in the house of a prostitute named Rukhinee Boistobee, who lived in the same house with another prostitute named Alladhee, and by whom she appears to have been treated as a daughter. The prostitute Rukhinee Boistobee is the person whose death is in question, and both she and the prisoner appear to have taken drink very freely, and no doubt, were to a considerable extent intoxicated. The prisoner and the woman Rukhinee went to bed soon after midnight in one room, and the woman Alladhee went to bed about the same time in an adjoining room, only separated by a partition wall which did not reach to the roof of the house. The woman Alladhee says, that more than once during the night she heard the prisoner and the deceased talking and singing, and the last time she heard this was at about 4 or 4½ in the morning. The next thing known is that on the woman Alladhee's going into Rukhinee's room when she got up in the morning, the prisoner was found to be gone, and Rukhinee was lying in bed with a cloth tied round her throat, and by which there is not the least doubt in the world that she had been strangled.

Now it is of great importance in this case, as it seems to us, to observe that these circumstances which are beyond all possible doubt put the prisoner in a position which rendered it imperatively necessary that he should clear himself from the imputation which naturally arises against him. He was known to have been in the company of the deceased person during the night, and he was the last person known to have been in her company whilst she was still living. It is proved by the woman Alladhee that the prisoner left the house only a very short time before the death was discovered, without awaking her and without communicating with her as was his custom. Had the prisoner chosen to remain absolutely silent under such circumstances, the inference would have been almost irresistible that he was guilty. That is of great importance, as it seems to us, in considering what value we should attach to the statements which the prisoner subsequently made. As far as appears upon the evidence, he has made three statements—one to the Inspector, one to the Assistant Magistrate, and one to the Sessions Court. As far as we can discover upon the evidence when he was first

visited by a constable and informed of the murder, he made no statement at all; but on the following day, on being sent for by the Inspector, he made a statement before him which, under the rules of evidence, cannot be made use of, but the nature of which, no doubt, may be inferred from the course taken by the Inspector. Then before the Assistant Magistrate, the prisoner again made a statement (probably to the same effect) which is relied on by the prosecution as amounting in fact to an admission of guilt in this case. According to that statement, after having passed the evening and the earlier part of the night in drinking with the deceased, and after having retired to rest with her, as I have described, some dispute took place between him and the deceased, and then he says that both of them being exceedingly drunk at the time, and he expressing his intention to leave the house, "Rukhinee (as he goes on to say) seized me by the leg. I said let me go, I am going to the Bari. On her not letting my leg go, I caught the cloth that was round her neck close up by the throat, and pulled at her. Then, as I was pulling, a sound (kok) arose. Rukhinee made this noise. I then let her go, and went to get some water in 'Goti.'" He then says that he found that she was dead. No doubt that is the same statement that was made to the Inspector. Before the Sessions Court he retracts this; he says that is not true; that he made it not voluntarily but under threats used by the Police officers and under their instructions; and that in fact he left the woman alive and knows nothing about the cause or mode of her death.

Now several objections have been made to the admissibility of this confession, but so far as any objections have been made to the course taken by the Assistant Magistrate, those are fully answered by the evidence of the Assistant Magistrate himself. He was called as a witness; and he has distinctly stated that the whole of the statement—everything which could in any way affect the case either for or against the prisoner—had been written down by him; and the fact of the prisoner himself having signed the confession after it had been carefully read over to him, the description of his demeanour given by the Assistant Magistrate while the confession was given, and also, the fact of the prisoner at the request of the Assistant Magistrate having acknowledged in writing that the statement was voluntarily made, make it perfectly clear that, so far

as the conduct of the Assistant Magistrate is concerned, no possible objection in point of law can be taken as to the admissibility of the confession. Then it is also said that the confession was originally obtained by the Police officer by means which are prohibited by Section 24 of the Evidence Act; that the Police officer had violated his duty as laid down in the Code of Criminal Procedure, Section 120; and that in fact the confession was caused by an inducement threat or promise, which was operating upon the mind of the prisoner when he repeated his confession to the Magistrate on the following day.

Now it appears to us that there is nothing in the evidence which would support that objection. Whether the statement made by the Police officer that the prisoner's brother-in-law had given out that he was guilty was actually true or not, it does not appear to us that there is anything which would justify us in inferring that the prisoner was induced to suppose that he would gain or lose anything by making the confession. If this amounted to anything at all, it was a deception practised on the prisoner, but though we might disapprove of any deception being practised, Section 29 of the Evidence Act expressly says that a confession made in consequence of a deception is not to be excluded. What, it seems to us, that we have to consider is not any technical objection of that kind, but whether or no, under all the circumstances of this case, we can fairly trust that the statement made by the prisoner before the Assistant Magistrate was made by him under such circumstances that we may safely rely upon it; and I think we may, because, as already pointed out in the earlier part of the judgment, it was absolutely incumbent upon the prisoner under the circumstances to state as well what occurred during that night as under what circumstances he left that room where the woman was found dead. It was not until the evening of the day following upon the night in which the murder was committed that he made the first statement, after he had had a considerable time to reflect, and he repeated that statement again under circumstances which seem to us to render it impossible to suppose that he then could have been under the influence of the Police. He had then had a further considerable time for reflection, namely, until the following morning. We think, therefore, that we must take that statement of the prisoner as being the best account which he could give of what he knew of the transaction. We have dwelt on this

point particularly, because we think it may be that the verdict of the jury may have turned upon it. We think it likely that the majority of the jury may have felt some doubt about accepting this confession. But giving all the weight that is undoubtedly due to their opinion and their experience in these matters, it seems to us impossible to do otherwise than to hold the prisoner bound by the statement which, as already shown, he, after deliberation, had chosen to make. It must be remembered that the prisoner is not an ignorant man. He appears to be a man of considerable education, and as such not open to influences and not so easily to be deluded as persons might be of an inferior position in life. Now, taking this as a statement which he chose to make as to what took place during that night in the room where he was with the deceased, we think that the very lowest inference which can be drawn from it is that the prisoner is guilty of culpable homicide not amounting to murder. The prisoner, no doubt, tries in that statement to make us believe that the woman attacked him; that she after abusing him seized him by the leg, and that he only just caught hold of the cloth round her throat and pulled it without regarding much what he was doing, and without any expectation that such consequences would ensue as to cause her death. But that part of his statement is not only to the last degree improbable in itself considering the length of time which it takes to put an end to a life by strangulation, and considering also the very slight provocation which the prisoner had received, but it is positively contradicted in one most essential particular by the evidence. It is proved by several witnesses,—and we see no reason to doubt that in this they spoke the truth,—that the cloth which was found in the woman's neck was not merely pressed upon it, but was tied in a single knot round her throat, and the only object of this that can be conceived is strangulation.

It seems to us, therefore, that, under the circumstances of the case, and giving all due weight to the finding of the majority of the jury, we cannot come to any other conclusion in this case than that the prisoner did cause the death of the woman Rukhinee, and that he did it under such circumstances as to render himself liable to being found guilty of culpable homicide as defined in Section 304 of the Indian Penal Code; and it therefore becomes our duty to pass sentence upon the prisoner. Taking all the circumstances of the case into our consideration, we think

that the ends of justice will be satisfied by passing a sentence of ten years' rigorous imprisonment, which, under the provisions of Section 59, we commute to ten years' transportation.

We take this opportunity of saying that in future we shall expect that the Government pleader will appear in all cases in which the Government desire to appear upon the day fixed for hearing.

The 16th June 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Security to keep the Peace—Summons—Act X of 1872 ss. 491 & 492.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Sessions Judge of Gya.

The Queen

versus

Gunga Singh and others.

In a case in which parties are summoned to show cause why they should not be bound down to keep the peace, the proceedings should be conducted with due regard to the provisions of ss. 491 and 492 of the Code of Criminal Procedure, and the summons should distinctly specify the amount and nature of the security required, and the time for which the security is to run.

Reference.—I HAVE the honor to submit, for the consideration of the Court, the record of this case, in which certain parties were lately bound over by the Assistant Magistrate of Jehanabad to keep the peace, and to recommend that the order requiring security be set aside on the following ground.

The summons, issued by the Assistant Magistrate calling upon the parties to show cause why they should not be bound, contains no specification of the amount or nature of the security required from them, or of the time for which the security was to run.

The omission of these important particulars appears to me to invalidate the document in which they do not appear, and to render all proceedings taken upon it null and void.

Judgment of the High Court.

Birch, J.—The Assistant Magistrate's proceedings have not been conducted with due regard to the provisions of Sections 491 and 492.

The summons was not drawn up as required by law, and the defendants were not allowed time to produce their witnesses.

In these cases it is very desirable that Magistrates should be careful that their proceedings are in conformity with the requirements of the law. If they are not—and the proceedings come before this Court as a Court of revision—they must inevitably be set aside.

The Judge's view of the law is correct, and the order of the Assistant Magistrate must be set aside as illegal.

Markby, J.—I concur.

The 16th June 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

Criminal Trespass—Right of Private Defence—Act XLV of 1860 ss. 96 & 104.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Sessions Judge of East Burdwan.

The Queen

versus

Dhaumun Teli and another.

Where a person assisted by a friend retaliated severely on another, who trespassed into his house with the object of having intercourse with his wife, he was held to have committed no offence.—Ss. 96 and 104 Penal Code justifying him in causing any harm short of death to the trespasser; and his friend was also acquitted as having aided him to commit no offence.

Reference.—THE facts of the case, as gathered from the record of the summary proceedings held under Section 222 Criminal Procedure Code, appear to be that Dhaumun Teli and Itwari Teli were on very bad terms, owing to the latter attempting to seduce or have intercourse with the wife of the former.

Itwari paid a nocturnal visit to Dhaumun's house, and being discovered was, as he deserved, beaten. But the Assistant Magistrate has convicted Dhaumun Teli of having used criminal force upon grave and sudden.

provocation, and sentenced him and a friend to one month's imprisonment.

I think Dhaumun Teli and Karu Lal are much to be commiserated. The former has defended his house and honor against the trespass of a would-be adulterer; and admitting on the mengre record that there was very violent retaliation, I think that, under Sections 96 and 104 of the Penal Code, he should be held to have committed no offence, as he was justified in causing any harm short of death to a person committing house trespass.

With respect to Karu Lal, I would give him the benefit of considering him to have aided Dhaumun Teli to commit "no offence."

As the men have undergone one-half of their sentence, and as there is no other record to call for, I submit the papers direct for the consideration and orders of the Court, with a view to the illegal sentence of the Magistrate of Raneegunge being set aside.

Judgment of the High Court.

Birch, J.—The view taken of this case by the Judge is correct. The sentence imposed upon Dhaumun and Karu Lal is quashed, and they must be acquitted of the charge.

Markby, J.—I concur.

The 16th June 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

*Criminal Trespass—Breach of the Peace—
Recognizance—Act X of 1872 ss. 447 & 489.*

*Reference to the High Court under
Section 296 of the Code of Criminal
Procedure by the Officiating Sessions
Judge of Mymensingh.*

The Queen

versus

Jhapoo and others.

On a conviction for criminal trespass under s. 447. Penal Code, the Joint Magistrate added to the sentence of imprisonment an order that the prisoners should give recognizances to keep the peace. The Sessions Judge recommended that the orders to recognizances should be quashed, as criminal trespass was not one of the offences detailed in s. 489 for which such recognizance could be taken. The High Court declined to act on this recommendation, holding that there was nothing illegal

in the Joint Magistrate's order, the conduct of the accused clearly pointing to an intention to commit a breach of the peace.

The Sessions Judge referred this case to the High Court with the following remarks:—

THE Joint Magistrate has convicted certain persons of "criminal trespass" under Section 447 of the Indian Penal Code, and has superadded to the sentences of punishment awarded an order that the parties convicted shall give recognizances of Rs. 100 each to keep the peace for one year.

The order is an illegal one. Section 489 details the offences on conviction of which before a Court of Session, or Magistrate of a Division of a District, or Magistrate of the first class, a person may be required to give a personal recognizance for keeping the peace: they are "rioting, assault, or other breach of the peace, or with abetting the same, or with assembling armed men, or taking other unlawful measures with the evident intention of committing the same."

I have not, under the circumstances, thought it necessary to call on the Joint Magistrate for any explanation.

I respectfully submit the proceedings to the Hon'ble Court, in order that the persons convicted, whose names are given in the margin, may be discharged from their recognizances.

The order of the Joint Magistrate was as follows:—

The case lies in a nut-shell. The accused evidently committed "criminal trespass" as defined in Section 447 Indian Penal Code, but with the exception of Adum Khan and Sheikh Jomeer no one appears to have used any particular violence. Those two are therefore sentenced to three months' rigorous imprisonment; Noora, Jhapoo, and Checha to one month's rigorous imprisonment each; Chamoo and Elahee Buksh, who appear to have taken very little active part in the proceedings, to pay each a fine of Rs. 5, in default to be imprisoned (rigorously) for fourteen days. All the accused to give recognizance of Rs. 100 each to keep the peace for one year.

Judgment of the High Court.

Birch, J.—We think that there is nothing illegal in the Joint Magistrate's order. The conduct of the accused clearly points to an intention to commit a breach of the peace, and we see no reason to interfere. The Joint Magistrate's order will stand.

The 17th June 1873.

Present :

The Hon^{ble} W. Markby and E. G. Birch,
Judges.

Sessions Trial—Evidence—Government Pleader.

The Queen

versus

Gunsha Moonda and others, *Appellants.*

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Chota Nagpore, on a charge of voluntarily causing hurt while committing robbery, and abetting thereof.

It is the duty of the Government pleader or other officer who conducts the prosecution before the Court of Session to point out to the Court any glaring discrepancy between the evidence being given by a witness before the Court of Session and that previously recorded by the committing officer.

Birch, J.—THE evidence against Wahid Ali is convincing, and there is no doubt that he planned the robbery. The second accused, Gunsha Moonda, has been identified by all the witnesses, and some of the stolen property was recovered from the jungle upon his pointing out where it was concealed. His statement that Kolha asked him to take care of it and that he refused, and told him to place it where it was discovered, is evidently false.

Against the third prisoner, Somra, the evidence is unsatisfactory. Two of the witnesses, Jeotee and Oobtee, who have stated before the Court of Session that they recognized Somra, when examined before the Magistrate, stated that they could not recognize the men who robbed them. The fact that twelve rupees were found on Somra's wife when she was taken to the thanuah is of itself no evidence of Somra's participation in the robbery; there is no evidence to show that that was part of the plundered property. The evidence against Somra is insufficient, and he must be released.

The sentence passed upon Wahid Ali and Gunsha Moonda is confirmed, and their appeals are dismissed.

It is the duty of the Government pleader or other officer who conducts the prosecution before the Court of Session to point out to

the Court any glaring discrepancy between the evidence being given by a witness before the Court of Session and that previously recorded by the committing officer. In this case it would appear that neither the Judicial Commissioner nor the Assessors were aware that the witnesses Jeotee and Oobtee had sworn before the Magistrate that they could not recognize their assailants.

The 19th June 1873.

Present :

The Hon^{ble} W. Markby and E. G. Birch,
Judges.

Stolen Property—Fine—Compensation—Market Overt—Act IX of 1872 s. 108—Act X of 1872 ss. 308 & 418.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Sessions Judge of Nuddea.

Nobo Kristo Acharjee

versus

Lall Chand Sheikh.

In a case in which the accused was charged with having stolen a pony, the Magistrate sentenced the accused to imprisonment, and awarded a fine of Rs. 25, which he ordered should, if realized, be paid over to the complainant, directing at the same time that the pony should be restored to a third party, by whom it had been purchased *bona fide* at a public sale, the Magistrate relying on s. 418, Code of Criminal Procedure, and on the rule of English law protecting a *bona fide* purchaser in market overt.

The Sessions Judge considered that s. 418 was not intended to supersede s. 108 Act IX of 1872, and that, as under the latter law, the property in the pony did not pass to the third party, purchaser, the pony should have been restored to the prosecutor:

Held that the fine of Rs. 25 imposed upon the prisoner could not be paid over to the complainant, either under s. 418 Code of Criminal Procedure, or under any supposed rule of law relating to sales in market overt, and that if any such order could be made, it would be under s. 308 of the Code of Criminal Procedure. The order so far as it directed that the fine be paid to the complainant was accordingly set aside.

Reference.—THE facts of this case, as obtained from the extract from register of cases of summary trials in Nuddea, Joint Magistrate's office, and from a petition dated 15th Bysack 1280, and the order thereon of 26th April, are as follows:—Nobo Kristo Acharjee prosecuted Lall Chand Sheikh for retaining a pony stolen from prosecutor. Lall Chand was sentenced to six months' imprisonment and to pay a fine of Rs. 25, or

to be imprisoned for one month more. The pony was made over to Ragoo, who had purchased it apparently in good faith from Lall Chand. The prosecutor, the proprietor of the animal, applied to the Joint Magistrate that his animal might be restored to him, but failed to get it as it had been made over to the purchaser Ragoo. The proprietor petitions this Court. I requested the Joint Magistrate to say why, with reference to Section 108 Act IX of 1872, Illustration A, the animal had not been given to the former proprietor. The Joint Magistrate's reply is annexed. I think with him that an authoritative direction on the point is much to be desired.

I admit that the purchaser of stolen goods who buys in good faith is much to be felt for; but I think the person whose property has been stolen is equally to be pitied; indeed I think he is the more to be felt for of the two. The property stolen was probably worth more to him than it is to the later purchaser.

Section 418 Criminal Procedure Code certainly does say that the Magistrate may make such order as appears right for the disposal of property regarding which any offence appears to have been committed; but Section 108 of Act IX of 1872 says quite as distinctly that no seller of goods can give to a buyer a better title to the goods than he has himself, and Illustration (A) to that Section says A buys from B in good faith a cow B had stolen from C: the property in the cow is not transferred to A. This illustration exactly applies to the case before me, and I cannot think Section 418 Criminal Procedure Code was intended to affect Section 108 of Act IX. The Magistrate can only be intended to give such order as is legally right, and the legal right to the pony in this case would certainly to my mind seem to be the petitioner's. I would, therefore, recommend the High Court to quash the order of the Joint Magistrate by which the pony is made over to Ragoo, and direct that it be restored to its original owner.

The order which the Joint Magistrate passed in this case was in the following terms:—

The Court finds Lall Chand Sheikh guilty of retaining stolen property knowing the same to have been stolen, and sentences him under Section 411 Indian Penal Code to be rigorously imprisoned for six months and to pay a fine of Rs. 25, in default to be further imprisoned rigorously for one month. The fine, if realized, to be paid to complainant.

The explanation of the Joint Magistrate was as follows:—

With reference to the endorsement of the Sessions Judge, dated 3rd May 1873, in the case of Nobo Kristo Acharjee vs. Lall Chand Sheikh, I have to state that the order of this Court was passed under Section 418 Code of Criminal Procedure. The animal was stolen in October last, and was purchased by the person (in whose possession it was found some months afterwards) in the same month at a public sale, and after giving notice of the purchase at the Police thannah.

The sale appeared to me, therefore, to be equivalent to a sale in market overt, and under the circumstances of this purchase, which was a public and *bonâ fide* one, and having regard to the fact that the purchaser had been in possession for some six months, it appeared to me that he was entitled to some protection, and that substantial justice would be done by directing that the fine, if realized, should be paid to the original owner.

I am not aware of any common law or decision bearing on the subject, but it seems to me that the rule of the English law protecting a *bonâ fide* purchaser in market overt is on the whole applicable to the case in question.

I have recently met with several cases in which extreme hardship would result if such an application of the English rule were not made. To quote one. A manjee had for some years (if I remember rightly, nine or ten) hired a large and valuable boat from another manjee. He had traded with this boat in certain localities for years as its plausible owner, and finally made a public sale of it at a fair price to a third party. The sale was made at a great distance from the village of the original and real owner, and it appeared to me that it would be a case of extreme hardship if restoration was ordered by a Criminal Court. In that case, therefore, I ventured to think that the rule of sale in market overt should be held applicable. Though the present is not so extreme a case, I still think the rule applies.

Section 418 Code of Criminal Procedure lays down no hard and fast rule on the subject, and I shall be glad to have an authoritative direction on the point, which is one of constant recurrence and of considerable importance.

Judgment of the High Court.

Markby, J.—We are quite at a loss to understand how, under Section 418 of the

Code of Criminal Procedure, or any supposed rule of law relating to sales in market overt, the fine of Rs. 25 imposed upon the prisoner could be ordered to be paid over to the complainant.

If any such order could be made at all, it would be under Section 308, but that Section does not appear to have been considered by the Joint Magistrate. We therefore set aside the order of the Joint Magistrate so far as it directs that the fine of Rs. 25 be paid to the complainant.

The 24th June 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

*High Court—Reference—Procedure—
Act X of 1872 s. 296.*

*Reference to the High Court under Section
296 of the Code of Criminal Procedure
by the Magistrate of 24-Pergunnahs.*

Nibarun Chunder Dass

versus

Bhuggobutty Churn Chatterjee.

A Magistrate should, under s. 296 Code of Criminal Procedure, exercise a discretion as to whether he will refer a case to the High Court, and is not bound to refer every case in which he may detect an error.

Letter No. 480, dated 19th May 1865 (3 W. R., *Criminal Letters*, p. 5) explained.

Markby, J. — We agree with the Magistrate in thinking that the conviction for criminal trespass cannot, strictly speaking, be supported; but it would seem from the Joint Magistrate's decision that an offence has been committed punishable under Section 291 or 431 of the Penal Code, and we therefore think it unnecessary, in the exercise of our discretion, to interfere.

We wish to point out that the Magistrate is, in our opinion, mistaken in thinking that he has no discretion, and is bound to refer every case in which he may detect an error for the opinion of the High Court. If, as in the present case, a punishable offence has been committed and a proper punishment inflicted, the Magistrate has full liberty to consider whether it is desirable or useful that a reference should be made. The words of Section 296 clearly leave a discretion to the Court which refers the case, and that discretion ought to be exercised. The

Magistrate has in this case been, no doubt, misled by the report to which he refers. We have carefully considered the letter* there partially printed, and the circumstances out of which it arose, and we are satisfied that all that the Judges meant there to lay down was, that when it was considered necessary to refer a case, a Magistrate should not abstain from doing so simply because the time for appealing had expired. We think that that letter ought to have no effect, in deterring Judges and Magistrates from exercising the discretion which the law allows them.

The 26th June 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

*High Court—Revision—Act X of 1872 ss. 294
& 297.*

(Miscellaneous Case.)

Debi Churn Biswas and others, *Petitioners.*

*Mr. Fergusson and Baboo Sreenath
Banerjee for the Petitioners.*

The questions which the High Court has to determine under Sections 294 and 297, Code of Criminal Procedure, are questions of law or procedure which affect the decision, and not questions of fact depending upon conflicting evidence which has been considered by the Judge, and upon which he has given his opinion adversely to the accused person.

Markby, J. — The object of this application is to induce us to interfere in a case where the accused person has been convicted by the Magistrate, and that conviction has been upheld by the District Judge on appeal. It is admitted, however, that we cannot at this stage of the proceedings do that, because the principal document upon which the question would turn before us, supposing we can entertain it at all, is not here. But Mr. Fergusson asks that we should send for that document from the Judge's Court of 24-Pergunnahs where it now is, in order that

* No. 480, dated 19th May 1865 (3 W. R., *Criminal Letters*, 5).

his application may be heard. We think we ought to decline to do so; because we think that, even if that document were here, we should be going beyond the duty of this Court in considering this case upon the evidence. The question which we are asked to consider is not one of law or procedure, but is a pure question of fact depending upon conflicting evidence, which evidence has been considered by the Judge, and upon which he has given his opinion adversely to the accused person. I think it would be going entirely beyond the practice of this Court under the Code of Criminal Procedure to entertain any such question. The Sections of the Procedure Code which define our duty in this respect are Sections 294 and 297. Section 297 speaks of cases in which we may consider that there is some material error in the proceedings. We do not think that means an error in the decision upon the facts, but some error in law or procedure which affects the decision. One of the Clauses of Section 297 also speaks of cases in which the accused person might have been legally convicted upon the facts of the case. We think that this allusion to the "facts of the case" does not in any way indicate that we should consider whether the case has been rightly determined upon the facts, but we are only to see whether the sentence passed might have been passed upon the facts as found. No doubt, the words of Section 294 are somewhat wider, and comparing them with the words of Section 295 it appears that the High Court possesses greater powers of revision than the Court of the Magistrate or of the Sessions Judge in similar cases tried by the Courts subordinate to them; because we can call for and examine every conviction and sentence as to their legality or propriety, whereas the Lower Courts can only examine them as to their legality. But again we do not think the word "propriety" can be used to cover such a case as this. We do not think either it was intended by the Legislature, nor has it been the practice of this Court to enquire into the propriety of a decision on the facts upon conflicting evidence. Therefore, without expressing any sort of opinion whether or no this case was rightly decided on the evidence, we think we ought to refuse the application for calling for the document to which we have already referred; because even if it were here, we do not think we can entertain the questions now sought to be raised.

The application is refused.

The 27th June 1873.

Present :

The Hon'ble W. Markby and E. G. Birch,
Judges.

*High Court—Jury—False Evidence—Abetment—
Causing Hurt to extort Confession or Informa-
tion—Police Officer—Act XLV of 1860 ss.
191, 194, 330—Act X of 1872 s. 118.*

The Queen

versus

Nim Chand Mookerjee and another,
Appellants.

*Committed by the Magistrate, and tried by
the Additional Sessions Judge of
Howrah, on a charge of abetting an
offence punishable with death or trans-
portation for life.*

*Messrs. J. T. Woodroffe and J. H. A.
Branson for the Appellants.*

In a case tried by jury, the High Court has no power to go into the facts of the case in order to see whether or not the conviction was right, that standing entirely upon the verdict of the jury. The Court has only to consider the facts, in order to see whether the Judge has done his duty in laying the case before the jury for their consideration.

Points out how the Sessions Judge's summing up to the jury should be dealt with by the High Court, first as regards the law, and then as regards the facts.

It is not necessary, under s. 194 Penal Code, that the false evidence which is given should be evidence given in a Court of Justice. Such statement, if made to a Police officer, would amount to the offence of giving false evidence as defined by s. 191, taking s. 118 of the Code into consideration.

A charge may be made under s. 330 of causing hurt for the purpose of extorting information which might lead to the detection of an offence, even if the supposed offence has not been committed. The offence which that section intended to describe is that of inducing a person by hurt to make a statement, or a confession, having reference to an offence or misconduct; and whether that offence or misconduct has been committed is wholly immaterial.

In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal.

There can be no offence of the abetment of giving false evidence unless the person charged with abetment intended not only that the statement should be made, but intended that the statement should be made falsely.

Markby, J.—THE short facts of this case, so far as it is necessary to state them for the purposes which we have now in hand, are that a person of the name of Koylash Chunder Mondul, who is one of the prisoners convicted in this case, but who is not now an appellant before us, used to cohabit with a person of the name of Mohiñy; and that he

having probably some cause of quarrel with her father, and taking advantage of her temporary absence, communicated to Tara Chand, who is one of the appellants here, that Mohiny's father had murdered her. Tara Chand communicated this to Nim Chand, who is also an appellant before us, and this led to information being lodged against Issur Napit for the murder of his daughter. The investigation did not proceed very far before it broke down, and Mohiny appeared. Thereupon proceedings were taken against Koylash, Nim Chand and Tara Chand for the part which they had taken in the affair, and that ultimately led to their being sent up to the Sessions Court, and tried there upon the charges, as subsequently amended in the Sessions Court, of abetting two persons, named Motee and Bhoot Nath, in giving false evidence under Sections 194 and 115, and also of causing hurt to Issur Napit, to Bhoot Nath, and to Motee, respectively, under Section 330 for the purpose of extorting information which might lead to the detection of an offence; and Koylash was also charged with instituting a false charge and with fabricating false evidence. The trial resulted in Nim Chand's being found guilty of having abetted the offence of giving false evidence by instigating Motee under Sections 194 and 115, and having caused hurt to Issur Napit under Section 330, and having caused hurt to Motee also under Section 330. Nim Chand has not been sentenced to any punishment under the first of those charges, but he has been sentenced to one year's imprisonment for causing hurt to Issur Napit, and five years' imprisonment for causing hurt to Motee. Tara Chand was tried upon charges similar to those against Nim Chand, but he has been acquitted on all of them except one, namely, that of abetment of giving false evidence by instigating Motee. The case was tried before a jury consisting of seven persons—three Europeans and four natives, and it now comes up to us upon appeal, not of course upon the facts, but upon various complaints which have been made against the summing up of the Officiating District Judge to the jury.

Now we may say at once that we consider that, under the law, we have no power whatever to go into the facts of the case in order to see whether or not the conviction was right; that stands entirely upon the verdict of the jury. We have only to consider those facts (and no doubt to that extent we must consider them) in order to see whether

the Judge has done his duty in laying the case before the jury for their consideration.

Now dealing with this, there is a very clear line of distinction to be drawn between the various objections that have been taken before us. So far as these objections are objections to the summing-up of the Judge upon points of law, we are bound to examine the Judge's observations with the greatest possible nicety. I do not at all mean to say that we are to apply to the record of his observations which we have before us minute verbal criticisms; but we are bound to see that he has laid before the jury what the law is upon the case which they had to deal with, and that he has laid it down rightly. But, so far as these objections are objections to the observations which the Judge has made upon the facts of the case, they ought to be looked upon in a totally different light. What a Judge says to a jury upon the law is (as the Officiating Sessions Judge very properly remarked in this case) an absolute and binding direction upon them. What he addresses to them upon the facts, are only such observations as he thinks it necessary and proper to make in assisting them to arrive at a conclusion upon the evidence which it is wholly in their province to deal with as they think proper, and the observations which a Judge would make to a jury upon the facts would be determined by circumstances which must vary, one may almost say, in every case and in every tribunal in the country. They would vary in a very great degree according to the intelligence of the jury whom the Judge was addressing; they would also vary very much according as the case had or had not been fully discussed both for and against the prisoners by Counsel prior to his addressing them. Had there been no discussion of a case by Counsel, it would undoubtedly be necessary for the Judge to point out many things which, after the case had been fully discussed on both sides, both for the Crown and for the prisoner, might well seem to him unnecessary. And, on the other hand, a Judge has very often to caution a jury against accepting without very careful consideration some of the suggestions that are made to them. When we are called upon to say whether or not the Judge has done his duty in addressing the jury on the facts, we must look to his summing-up as a whole, and see that the case has been fairly laid before them.

Now upon the facts, the simple point upon which the Judge's attention had to be drawn in this case was whether or no they could

believe the evidence of the witnesses who had been brought before them for the prosecution. The trial was one which lasted over a great many days, and we know that both sides were represented by able Counsel, and it may be fairly presumed that all the salient questions upon the evidence were fully brought to the notice of the jury. Nevertheless the Judge did, and we think did rightly, impress upon the jury that there were some important facts of the case to be considered by them before they could accept the evidence which had been given. It is quite true that Mr. Woodroffe in his able address to us to-day has pointed out other circumstances which were not alluded to specifically by the Judge, and which were well worthy the attention of the jury in forming their opinion upon this case. But we do not think that it is the duty of this Court to say that the Judge has not properly placed the case before the jury, because he has not adverted to every circumstance which might seem to us to be important. There might be cases, no doubt, in which it might appear that a summing-up of the evidence on the facts was so defective that it was not a fair statement of the case to the jury; but this summing-up cannot be and has not been so characterized. It is only said to be defective in not noticing all the considerations favorable to the prisoners, but how far that was necessary would very much depend upon the consideration as to how far the facts and circumstances of the case were brought to the notice of the jury by the Counsel who had addressed them. We do not see any reason whatever to doubt, in this case, that, so far as it was necessary, the Officiating Sessions Judge has addressed the jury as fully as was necessary upon the evidence which they had to consider. Therefore, we think that, so far as the objection taken to the summing-up of the Judge to the jury upon the facts is concerned, we ought to hold that that summing-up was quite sufficient.

But there remain to be disposed of three points upon which the Judge has given his direction to the jury on points of law. The first of those with which we have to deal is where the Judge says that "it has been contended also that the false statements of Bhoot Nath and Motab in respect of which the prisoners have been charged, having been made to the Police only, were no evidence, and that therefore Section 194 is not applicable to this case. This contention is unsound." Now, in order to establish a

conviction for abetment, it is no doubt necessary that the crime which was abetted should have been intended to be committed; and, supposing that those statements had been only intended to be made to a private individual, this objection would probably be good. But it is not necessary under Section 194 that the false evidence which is given should be the evidence given in a Court of Justice. Section 191 provides that whoever is bound by any express provision of law to state the truth upon any subject and makes any statement which is false, and which he knows or believes to be false, is said to give false evidence. Now, under Section 119 of the Code of Criminal Procedure, a Police officer making an investigation may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and such person shall be bound to answer all questions put to him by such officer; and it would be a complete offence of giving false evidence as defined by Section 191 taking into consideration the provisions of Section 118 of the Code, if a false statement had been made by such person. There is, no doubt, therefore that, whether this statement was intended to go further than the Police or not, it would fall within the definition of the false evidence given in that Section. But as the Judge points out, and we think rightly points out, it was clear that, if this offence was committed at all, it was intended that those false statements should be given, not only in the Police office, but also in the Magistrate's Court and ultimately in the Court of Sessions; and, therefore, in either view of the case, we think this objection fails.

Then another objection in point of law was that no charge can be made under Section 330, because the supposed offence of murder had not been committed at all, and that, where no offence had been committed, no confession or information likely to lead to its detection can be extorted. The words of Section 330 are, that whoever voluntarily causes hurt for the purpose of extorting from the sufferer any confession, or any information which may lead to the detection of an offence or misconduct, is liable to the punishment mentioned in that Section. Now there is no doubt that in one sense it is true that, where there has been no offence, no information can lead to the detection of it; and perhaps it may be said that the definition of the offence is expressed in words not very happily chosen. But, as it appears to us, it was not the intention of the Legislature

to confine the offence under this Section to cases in which an offence had actually been committed. We think that, upon the true construction of that Section, it is wholly immaterial whether an offence has been committed or not. It seems to us that the offence which that Section intended to describe is that of inducing a person by hurt to make a statement or a confession having reference to an offence or misconduct; and whether that offence or misconduct had been committed is wholly immaterial. As a matter of fact some of the worst cases which have come before this Court of causing hurt for the purpose of extorting a statement or confession by Police officers, have been cases in which no offence has been committed; and no instance has been shown of any objection having ever been taken that that element was necessary to constitute the offence under this Section. A case of this kind will be found in the 7th Weekly Reporter, page 3, Criminal Rulings. That is a case which in some of its salient features is very like the present, and which was very fully argued by Counsel. In that case four persons were convicted under this Section, although it was quite clear that no offence was committed, because the supposed murdered person was found to be alive and was present at the trial. We think, therefore, that that objection also fails.

There remains the other objection that the summing-up of the Officiating Sessions Judge is erroneous in respect of Section 194; and having both of us given the most careful attention that we could give to this summing-up, we are compelled to come to the conclusion that in that respect the law as laid down by the District Judge is defective. The offence which is supposed to have been abetted is that of giving false evidence, and it requires no argument to establish that no person can abet the giving of false evidence unless he knows or believes that the evidence which is intended to be given, or which he desires to be given, is false. In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but, in some way or other, it is absolutely necessary to connect him with those steps of the transaction which are criminal. Therefore it seems to us clear that, unless the jury were satisfied that these persons not only intended that those statements should be made, but intended that those statements should be made falsely,

they cannot be said to have committed any offence under this Section. Indeed, it is probable that the Officiating Sessions Judge in this case was perfectly aware that that was the law, and for that reason we should have some hesitation in putting a construction upon his charge which is so plainly opposed to the law. But we must read the charge, not of course as the Judge may have intended, but as we may fairly suppose that the jury understood it; and I think, taking the charge all through, it is probable that the jury may have been misled by it and may have come to the conclusion that it was an offence, as described in this summing-up, to instigate a person to make statements which ultimately turned out to be false, whether the persons who instigated them knew them to be false or not. The general observation which the District Judge makes at the outset is this. He says:—"According to my view of the law, however, it is immaterial, as far as your verdict on this charge is concerned, whether the prisoners did or did not believe the case to be a true one. For if they simply endeavoured honestly to ascertain the truth by questioning persons likely to know it, no blame could attach to them." So far I entirely agree with what is stated. Then he goes on to say:—"But if they began by assuming, whether in good faith or not, that the case was a true one, and then pressed persons to make statements supporting that view, they would be in my opinion legally responsible for those statements if false, and would be guilty of abetment of the giving of false evidence." That statement of the law is defective. The Judge should have said, "and then pressed persons to make statements which they knew or supposed to be false." Then it becomes necessary to look through the rest of the charge, in order to ascertain whether the imperfect statement of law in that part has been amended afterwards; and, looking through the whole of this charge, we find that, wherever the Judge had to say anything in respect of the offence under this Section, he falls into the same error. A little further on he says:—"The question for you to decide is whether they (the statements) were made at the instigation of the prisoners or any of them or not. If the statements were made at the instigation of the prisoners, then they are liable to punishment under Section 115 read with Section 194." There again he ought to have told the jury, "if the

statements were made, at the instigation of the prisoners, *and they knew or believed them to be false*, then they would be liable to punishment under those Sections," or something to that effect. Then when he goes to deal more particularly with the facts of the case as regards Nim Chand, having gone through them with some minuteness, he says in speaking of any motive that Nim Chand might have had, that "the only explanation of such conduct in Nim Chand would seem to be that, as suggested by his own Counsel, he was anxious to gain the approbation of his superiors by a successful investigation of what he may have supposed to be a true murder case. This might lead him to press witnesses to say what would prove the case: but, if statements made at his suggestion turned out false, he would be responsible for them." This statement would mislead the jury unless it is qualified by saying that they must have known or believed that the statement to be so made was false. The Judge reverts to it again when summing-up the case against Nim Chand as regards the instigation of Motee. He says:—"It is impossible to believe that it (the statement) was spontaneously made, and there is nothing beyond the evidence for the prosecution to show how it was elicited. You must say whether or not Nim Chand was concerned in procuring it." Here again he ought to have told the jury "in procuring it with a knowledge that it was false." These are all the observations which the Judge makes under that Section; and taking all these observations together, we think that it is quite probable that they may have misled the jury as to what the law is in this respect. Under these circumstances we are bound to say that, so far as the convictions under that Section are concerned, they cannot be supported. Those observations were made only with reference to the case of Nim Chand, but no separate statement of the law was made with reference to the case either of Tara Chand or of Koylash. Therefore, even though Koylash has not appealed, we are obliged to apply the same rule to his case so far as the conviction under that Section is concerned; and we think that neither as to Nim Chand nor Tara Chand nor Koylash can the convictions under that Section be supported. But it appears to us that, although that is so as regards the summing-up of the District Judge and his laying down the law under Section 194, the

conviction under Section 330 remains wholly untouched. Under that Section, the law as laid down by the Sessions Judge, appears to be wholly unimpeachable. With reference to the charge under Section 330, we have already expressed our opinion that it was wholly immaterial whether or not an offence had been committed, and that it was wholly immaterial whether the person causing hurt believed that an offence had been committed; and it seems to us equally immaterial whether the person causing hurt believed that the information which was about to be given was or was not true. That Section is directed against any violence whatever, and to obtain any sort of confession or statement having reference to a criminal charge.

We think therefore that, although there being an error in the summing-up of the District Judge, we ought to quash the convictions under Section 194, yet the law as laid down by him in respect of the charge under Section 330 is right, and the convictions on this charge ought not to be interfered with.

The result is this that, as regards Nim Chand, his punishment remains precisely the same, because the Judge has not proceeded to pass any sentence upon him on the first charge; and so as regards Koylash. As regards Tara Chand, he having been acquitted upon all the charges except the first, his conviction must be quashed altogether: and, I think, we may fairly say, that that is a result which apparently need not be regretted. We cannot reconcile his conviction upon this charge, and his acquittal on the other charges, with the observations which were made by the jury in answer to a question put by the Judge which led to his passing no sentence upon Nim Chand and Koylash under Section 194.

With regard to the punishment, we think we cannot say that this is a consolidated sentence. The Judge has carefully passed his sentence separately upon each charge; but notwithstanding that, if we felt that the expression of our opinion that Nim Chand must be acquitted upon the first charge really affected the amount of the punishment which he ought to receive, we should have no hesitation in reducing the sentence passed by the Sessions Judge. But it appears to us that it really does not. The propriety of the sentence upon Nim Chand depends upon whether or not any violence was used by him to extort the information in question; and if the verdict of the jury in that respect was right, and we think we are bound to

assume in the absence of any allegation to the contrary that that verdict was right, it appears to us that the sentence passed upon him is no more than he deserves, and we see no ground for reducing it.

As regards Tara Chand, the conviction as against him will be set aside altogether, and he will be acquitted.

The 1st July 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Jurisdiction—Revival of Case—Discharge.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Officiating Sessions Judge of Sylhet.

Hari Singh

versus

Danish Mahomed and others.

A Magistrate of a district has power to order a Subordinate Magistrate to revive a case in which the accused had been discharged.

Reference.—THE facts of the case are as follow :—

Hari Singh Peadah was deputed to serve a warrant in a registration case on Sundori Bebee. He executed it, and was taking Sundori along with him, when Danish and others came and rescued her from custody. The Deputy Magistrate, Mr. Black, after hearing the evidence of some of the witnesses, and without putting accused on his defence, discharged him under Section 215 new Criminal Procedure Code on the 4th April last, holding that a counter-charge brought against the Peadah was proved. The Moon-siff in whose Court the Peadah was employed, then made a representation to the Magistrate, and asked that the case might be revived and further evidence taken. Meanwhile, the Magistrate had heard the appeal of the

counter-case in which the Peadah had been punished, and reversed Mr. Black's order on that case.

The Magistrate of the district, holding, there had been a failure of justice in the rescue case, applied to this Court for instruction whether he could revive the case or not. I answered in the affirmative, as I had already expressed my opinion in my memorandum of the 20th May filed in the kidnapping case of Kistoram Mohara *vs.* Anis and others,* submitted this day to the Honorable Court under the provision of Section 297 Criminal Procedure.

The Joint Magistrate evidently fixing on the words "failure of justice" in the Magistrate's memorandum holds that the Magistrate of the district has not the power to revive the case and to make it over to him for disposal.

In my opinion the Magistrate of the district had the power to revive a case, not on account of "failure of justice," but on an application for a revival of a case on the ground of there being "further evidence procurable which was not before the Court when the order of discharge was given."

The Joint Magistrate refers to the arguments adduced in his letter† of 31st May

* See next case.

† The letter of the Joint Magistrate ran as follows :—
With reference to your proceeding dated 28th May 1873, endorsed on the record reviving the case Hari Singh Peadah *vs.* Danish Mahomed, Section 225 Indian Penal Code, although evidently by mistake on the record Section 224, Indian Penal Code, discharged by Mr. Deputy Magistrate Black under Section 215 Code of Criminal Procedure, and referring it to me for trial, I have the honor, before proceeding with the case, respectfully to request the favor of your informing me under what Section of what law you have acted in reviving this case so discharged. I have already had the advantage of the opinion of the Sessions Judge, dated 20th May 1873, given on your letter of reference to him, No. 661, dated 15th May 1873, attached to the record in case Queen *vs.* Anis Mohara and others, copy of which was forwarded by you to me under memorandum No. 686, dated 21st May 1873; but neither in that opinion nor in his subsequent opinion, dated 27th May 1873, endorsed on the records of this case and asked for by you in your endorsement on the record dated 23rd May 1873, has he favored you with any authority for the power of revival on the ground of failure of justice of a case discharged under Section 215 Code of Criminal Procedure. I have carefully searched the law for myself, but have been unable to find any such authority vested anywhere else than in the Honorable the High Court under Section 297 §1 of the Code of Criminal Procedure. In confirmation of this, I would beg to draw your attention to my explanation dated 31st May 1873, accompanying the record of the case Queen *vs.* Anis Mohara and others, forwarded this day to you with a view to a reference to the High Court.

which is filed with the kidnapping case; but no where throughout that letter can I find the word revival mentioned. The Joint Magistrate appears to consider revival of a case and revision of a case by the Honorable Court as one and the same thing.

Section 296 of the Criminal Procedure lays down that the Sessions Judge and Magistrate have the power of referring a case to the High Court for revision when the judgment or order is contrary to law, &c. But in this case the point in question is the revival of the case by the prosecuting party, and not that the judgment or order is contrary to law. It could never have been intended by the Legislative Council that all orders for the revival of a case must issue from the High Court, and from no other Court. If such had been the intention of the law, the same would have been specified in Section 296.

I hold in the present case that the order of the Magistrate of the district was legal, as he has the power of entertaining complaints, and so has the power of reviving a case on a fresh complaint, and he has also the power of making a case over to any subordinate; and I further hold that the Joint Magistrate was in duty bound to proceed with this case under the order of the Magistrate dated 28th May last.

Judgment of the High Court.

Couch, C.J.—In this case we are of opinion that the Magistrate had power to make the order of the 28th of May last, and the Joint Magistrate was bound to treat the prosecution as revived and to proceed with the case.

The 1st July 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Jurisdiction—Discharge—Revival of Case—Complaint—Remand.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Sessions Judge of Sylhet.

Kistoram Mohara

versus

Anis and others.

In a case before the Joint Magistrate in which the prosecution was closed, and the accused discharged under

Section 215 of the Code of Criminal Procedure, the Magistrate, on a petition presented to him by the prosecutor, passed an order of remand directing the Joint Magistrate to proceed with the case at the stage at which he left it:

Held that the discharge not being equivalent to an acquittal, the Magistrate might have received a complaint if he saw sufficient reason for doing so, and might have made it over to a subordinate officer to be heard, but he had no power to make the order of remand which he made.

Reference.—The charge was one of kidnapping, &c., and was prosecuted in the Court of the Joint Magistrate by the Police, assisted by the Assistant Superintendent of Police, Mr. Raban. The examination of some of the witnesses only occupied two days, and when Mr. Raban was not present, the Joint Magistrate called on both sides to argue the case and discharged the accused under Section 215 new Procedure Code. The injured party, i.e., the husband of the kidnapped girl, then petitioned the Magistrate of the district to have the case reheard, as all his witnesses had not been examined before the accused were discharged. The application being one of simple revival, the Magistrate of the district should in my opinion have granted the application stating that in his opinion the real complainant had given good and sufficient reasons for reviving or admitting the case to a rehearing, and he might then have made it over to any subordinate officer. Instead of this, the Magistrate unfortunately recorded an opinion on the management of the case, and on the recorded decision passed an order of remand directing the Joint Magistrate to proceed with the case at the stage at which he left it. Manifestly by that order the Magistrate usurped the powers of revision given to the High Court alone under Section 297 Paragraph 2 of Act X of 1872 Criminal Procedure.

I hold that the Joint Magistrate was right in declining to obey that order, and I forward the papers and request that the order of remand passed by the Magistrate on the 7th May 1873 may be set aside.

Further, I beg to solicit the sanction of the Honorable Court in its power of revision to direct that the original case may be remanded, as the accused were improperly

discharged. Section 215 Explanation III lays down that an order of discharge cannot be passed until the evidence of the witnesses named for the prosecution has been taken. In the present case the prosecution was brought on the information of the husband of the kidnapped girl. The girl was taken from place to place in open day light. There is proof that the girl is under 16, and it does not matter whether she went of her own accord or was forcibly taken. There was no consent given to her being taken either by her husband or her father, and if the girl was precocious the Joint Magistrate had not the power to form an opinion opposed to the provisions of the law as to the age at which an offence could not be treated as kidnapping. The girl may have been ill-advised, or a bad character, but that did not and cannot alter the law of guardianship and minority. Again, the Joint Magistrate has considered that the prosecution was made by the Police on the part of the Crown, and that the injured party could not interfere or apply to the Court in any way for the revival of the case. This is certainly a very unsafe argument and clearly shows the need of giving to Magistrates a power of revival when the Police have mismanaged a case, or a Magistrate has put a wrong interpretation on the law. The opinion expressed by the Joint Magistrate is equivalent to stating that, when a party has laid his complaint before the Police, he is not to stir hand or foot without the orders or consent of the Police.

There is one other point mooted in this case and on which the Magistrate desires an opinion, namely, whether the Magistrate of the district has the power to order the revival of a case when the accused have been discharged under Section 215. I consider that, when a complainant has fresh and reliable evidence, he can apply either to the officer who disposed of the case if he have the power to entertain complaints, or to the Magistrate of the district and ask to have the case revived, and that in such cases there is no necessity to forward the records to the High Court to exercise its powers of revision.

Section 296 lays down that *it is only when the judgment or order is contrary to law, &c.,* that a report is to be made to the High Court. It is therefore manifest that the

power of revival rests with the Magistrate of the district, and those of his subordinates who are entrusted with authority under Section 21 Clause 10, with power to entertain complaints and receive Police reports. An application for revival must of course be founded on the ground of proof other than that already recorded being forthcoming. The case has not been treated by either the Magistrate or myself as coming under the provisions of Section 195 new Criminal Procedure, and it is therefore unnecessary for me to answer the lengthy arguments given by the Joint Magistrate on this point.

Judgment of the High Court.

Couch, C.J.—It is stated in the proceedings of the Joint Magistrate on the 25th that no further evidence was offered for the prosecution, and the examination of the accused persons was then taken, after which the case was adjourned. On the next day, the Joint Magistrate having, as is stated, heard the Police and the mookhtar of the accused, discharged them, which was regular under Section 215.

It does not appear that any application was made to him on the 25th to take any further evidence for the prosecution, and the Police, who appear to have had charge of the prosecution, allowed him to take the examination of the accused persons, which would not have been proper if there was other evidence to be produced. The discharge, however, was not equivalent to an acquittal. The Magistrate might have received a complaint if he saw sufficient reason for doing so, and might have made it over to a subordinate officer to be heard; but he had no power to make the order of remand which he made. That order, dated the 7th of May last, must be set aside.

The 9th July 1873.

Present :

The Hon'ble F. A. Glover and E. G. Birch,
Judges.

*Forgery—False Endorsements—Registration—
Mohurrir—Public Servant—Act XLV of 1860
s. 464—Act IX (B.C.) of 1862.*

The Queen

versus

Dwarkanath Ghose, *Appellant.*

*Committed by the Magistrate, and tried by
the Sessions Judge of West Burdwan,
on a charge of forgery, &c.*

*Baboo Rashbehary Ghose and Bhojany
Churn Dutt for the Appellant.*

*Baboo Juggadanund Mookerjee for the
Prosecution.*

Where the accused, a mohurrir in a Registry office, was charged with making false endorsements of registry on the back of certain deeds, which endorsements were signed by the Registrar, it was held that, before he could be convicted of forgery under Part 3 s. 464 Penal Code, it must be shown that the Registrar, in consequence of deception practised upon him by the accused, did not know the contents of the document he was signing.

Money received by a mohurrir, appointed under the Registration Act IX (B.C.) of 1862, by way of fees for registering deeds, is money entrusted to him as a public servant.

Glover, J.—THE prisoner, who was a clerk or mohurrir in the District Registry office at Bancoorah, has been convicted (1) of misappropriating certain moneys entrusted to him in his capacity of Registry mohurrir, under Section 409 Penal Code; and (2) of forgery in three several instances under Section 466 Penal Code.

For the first offence he has been sentenced to be rigorously imprisoned for three years, and to pay a fine of Rs. 500 with an extra year's imprisonment on default; for the second, to six years' rigorous imprisonment (two years for each forgery).

He has appealed to this Court, and his case has been fully argued by Counsel. After going through the record and hearing the junior Government Pleader for the Crown, we are of opinion that the conviction under Section 466 Penal Code cannot be sustained.

What are called the three forgeries are three endorsements on the backs of three documents brought to the Registrar's office for registry, to the effect that the deeds in question had been duly registered in such and such a page or pages of such and such a volume.

These endorsements were admittedly signed by the District Registrar, the Principal Sudder Ameen of the District, Baboo Huro Chunder Chatterjee.

The accused is said to have forged these signatures in the sense of Part 3 of Section 464 Penal Code, inasmuch as by his misrepresentations, the Registrar was led to suppose that the deeds had been duly copied into the books, and signed the endorsement on that understanding.

But, as a matter of fact, there is no evidence that the Registrar was so deceived: he does not say so in his evidence, and it is clear that he had the means at hand of at once verifying the correctness of the endorsement he was signing; and it appears that in some cases he did so. But however this may be, before a conviction under this Section can be had, it must be shown that the Registrar, in consequence of deception practised upon him by the accused, did not know the contents of the document he was signing. There is no such allegation in the present case. On the contrary, the Registrar admittedly knew perfectly well the nature of the certificate he was signing. The forgery Sections of the Code cannot be made to apply to this case; a conviction might possibly have been had under Section 415 (cheating), but, under the circumstances, we do not think it advisable to alter the conviction. The whole thing was brought about by the most culpable neglect of his duty by the Principal Sudder Ameen Registrar.

Another reason for not altering the conviction is that the accused will be sufficiently punished by the sentence of three years' rigorous imprisonment and fine imposed on him for the offence of criminal breach of trust under Section 409, and of which we think he has been properly convicted.

By Act IX (B. C.) of 1862, all Registry officers were appointed by Government, and part of a Registry mohurrir's duty was to receive the fees paid by parties bringing deeds for registry. We have no doubt that money so received (and it is proved by the evidence of several witnesses that it was so received) would be money entrusted to the mohurrir as a public servant. With regard to the particular deeds which form the subject of this trial, it may be fairly presumed that the fees were duly paid upon them, inasmuch as no registration would be effected or said to have been effected until these fees were paid. It is proved that fees so paid were kept by the accused until the usual remittance was made to the Collector, and it

is not denied that the accused has not been able to account for the moneys that must have passed through his hands.

After reading the evidence and giving every consideration to what has been advanced in behalf of the prisoner, and not forgetting that much of what has happened was caused by the systematic neglect of his duty by the Registrar, we can see no sufficient reason for interfering with the Lower Court's finding and sentence under Section 409 Penal Code. The conviction under Section 466 is set aside; that under Section 409 will stand.

The 10th July 1873.

Present:

The Hon'ble F. A. Glover and E. G. Birch,
Judges.

*Accused Person—Examination—Certificate—
S. 346 Code of Criminal Procedure.*

Reference to the High Court under Section 287 of the Code of Criminal Procedure by the Sessions Judge of Beerbhoom for the confirmation of the sentence of death.

The Queen

versus

Lucky Narain Dutt, *Prisoner.*

In recording the examinations of accused persons under s. 346 of the Code of Criminal Procedure in the language in which they are given, a Magistrate need not take down the examination in his own hand; it is enough that he append a certificate that the examination was conducted in his presence, and contains accurately all that was stated by the accused person.

Glover, J.—UNDER the circumstances we do not think it advisable to confirm the sentence of death passed by the Sessions Judge, and alter it accordingly to one of transportation for life.

The attention of the Extra Assistant Commissioner should be drawn to Section 346 of the Code of Criminal Procedure, under which, as has been ruled by this Court, all examinations of accused persons are to be recorded in the language in which they are given.

There is nothing in the Procedure Act which necessitates a Magistrate to take down such examinations in his own hand. It is enough that he append a certificate that the examination was conducted in his presence, and contains accurately all that was stated by the accused person.

In this particular case the deposition of the Extra Assistant Commissioner proved the fact of the accused's having made the confession as stated, but there might very easily

be cases in which the omission on the part of a Magistrate to carry out the provisions of Section 346, Code of Criminal Procedure, might cause a failure of justice.

The 11th July 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Jury—Verdict.

Committed by the Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of dacoity.

The Queen,

versus

Menjan Sheikh, *Appellant.*

A Judge ought not to put questions to any of the jury as to his reasons for the verdict he has given.

Couch, C.J.—We reject the appeal, and let the Judge be informed that he ought not to put questions to any of the jury as to his reasons for the verdict he has given.

The 11th July 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

References—Act X of 1872 s. 296.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Officiating Sessions Judge of Dacca.

Rajkisto Paul

versus

Nittyannund Paul.

Where a Sessions Judge considers that a judgment or order is contrary to law, or that the punishment is too severe, he should report the proceedings to the High Court in the manner prescribed by the Circular Order of 15th July 1863, which is applicable to references under S. 296 of the present Code of Criminal Procedure.

Couch, C.J.—Let the Sessions Judge be told that the Circular Order dated the 15th of July 1863, which applied to references under Section 434 of the late Code, is applicable to references under Section 296 of the present Code of Criminal Procedure, and that if he is of opinion that the judgment or order is contrary to law, or that the punishment is too severe, he must report the proceedings to this Court in the manner prescribed by that Circular.

The 12th July 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Procedure—Sessions Trial—Charge—Attempt—Rape—Act X of 1872 s. 283.

Committed by the Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of attempting to commit rape.

The Queen

versus

Parbut Sheikh and another, *Appellants*.

Act XVIII of 1862 s. 17 does not apply to a trial before a Sessions Judge, but only to trials on the original side of the High Court.

The want of any charge of an attempt to commit rape is a defect which is cured by s. 283 of the Code of Criminal Procedure.

Couch, C.J.—THIS appeal is rejected, but the Court remark that Act XVIII of 1862 Section 17 does not apply to a trial before the Sessions Judge; it only applies to trials on the original side of the High Court. The Court suppose that the Sessions Judge meant Act XVIII of 1862, and not Act XVII of 1862, as stated in the heads of charge. The want, however, of any charge of an attempt to commit rape is a defect which is cured by Section 283 of the Code of Criminal Procedure.

The 16th July 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Land Dispute—Breach of the Peace—Possession—Act X of 1872 s. 530.

(Criminal Motion No. 115 of 1873).

Pirthiram Chowdhry Rai Bahadoor, *Petitioner*.

Mr. J. T. Woodroffe and Baboos Doorga Mohun Dass and Mohinee Mohun Roy for the Petitioner.

The possession regarding which parties are required to give proof in a case under s. 530 Act X of 1872

relating to a dispute for land in respect of which a breach of the peace is apprehended, is possession at the time the proceedings are instituted by the Magistrate, and not possession at the time the Magistrate comes to his decision.

Couch, C.J.—IN this case, Mr. Woodroffe applied to us to send for an order of the Extra Assistant Commissioner of Gawalpara, which had been made under Section 530 of the Code of Criminal Procedure. A copy of the order is annexed to the petition upon which the application was made. It states that several cases having been brought in Civil and Criminal Courts by and against certain ryots for forcibly taking some paddy and timber from a piece of waste land, and as some of them were convicted and sentenced, the Deputy Commissioner of the district ordered the institution of the present suit under Section 318 of Act XXV of 1861, and called on the parties to give in written statements of their respective claims as respects the fact of actual possession of the subject of dispute, and referred the case to the Extra Assistant Commissioner for disposal.

After stating some matters which I need not read, the Extra Assistant Commissioner says:—"I tried carefully to ascertain the following points for the decision of the case: first, what is the boundary and quantity of the land in dispute; and second, whether the land is in the possession of the first or the second party."

He then states his decision as to the boundary; and on the question of possession, he says that the evidence which had been produced does not show that the second party, who is the applicant in this case, has right to the land, nor does it show his actual possession of the same; and says:—"The Deputy Commissioner called on the second party to show his possession, but not to create proof of possession after the institution of this case, as he appears to have done, by supplying temporarily a set of men to use force to the ryots of the opposite party, from which account it has become apparent that he was rather unable to prove the actual possession of the land."

He then states some proceedings of the applicant, or persons who the Deputy Commissioner considers had been employed by him, and says that "after the houses had been burnt, the zemindar made an application for a guard of Police to keep the peace there, and had a few constables deputed to the spot at his cost" (this being subsequent to the institution of the proceedings); and

proceeds:—"His people put up some new huts on the spot, emboldened in the presence of the constables, and prevented the other party from re-building their houses there." They collected a number of men who actually beat certain people of the first party while they were going along the road; they took some paddy from a piece of land cultivated by one of the ryots of Habraghat, and used force to him. They were continuing on with repeated invasions, till I visited the spot and punished some of them in cases brought against them. While I visited the place, I found about fifty men, including two tehsildars and several burkundazes of Meehparah, in a few newly built huts, styled there Tehsil Kutcherree. These huts were situated in the jungle, and far off from the ryots of Meehparah. Although some of these men were punished as stated before, they and some of the vakeels, including Baboo Seetul Chundra Bagchee, dewan, seemed to me to be rather glad, and were under the impression that the punishment would show that they on behalf of their client the second party (the applicant to us) were in possession of the land, and that cutting jungle of a few beegahs of land, and structure of the few huts, though raised after the institution of this case under Section 318 of the Code of Criminal Procedure, was a formidable proof to entitle their landlord (2nd party) to retain the possession under Section 530, Criminal Procedure Code, of the whole piece of waste land containing 1,973 beegahs, or about 700 times the land they occupied temporarily; and this impression, I suppose, would have led to the engagement of numerous ryots of Meehparah to occupy every bit of jungle land for a few hours on the occasion of my visiting the place, in order to make improvement of the proof, had I not gone there all of a sudden and without giving any previous notice to the parties."

Having stated these proceedings, he says:—"It is clear from the words 'actual possession' in the latter part of Section 530, and the words 'previous possession' in the margin of Section 531, Criminal Procedure Code, that in a case of this kind it is necessary to see which party is actually in possession of the subject of dispute before the row which caused the institution of the case, and not after it; and it appears from the stamped and registered pottahs and kubooleuts and the evidence adduced on behalf of Govind Pria, that the land in dispute, excepting the joolies, is in such possession of the first party." He then makes an observation upon the conduct

of the second party, and adverts to the circumstance that the gentleman on whose behalf these proceedings were taken is an Honorary Magistrate.

Mr. Woodroffe in making the application raised the same question that these persons appear to have thought they could raise before the Magistrate, and submitted to us that the question for the Magistrate to determine was whether his client was in actual possession at the time of making the enquiry.

The Magistrate, I think, notwithstanding the use of some expressions about the possession before, what he calls, the row, has in effect found which party was in possession at the time the proceedings were instituted; for various passages in his judgment show that this was what was present in his mind, and that he was considering the distinction between the possession when the proceedings were instituted and the possession which the parties tried to make it appear there was when he came to the spot. I think he is right in the construction that he has put upon the Code of Criminal Procedure, Section 318 of the late, and Section 530 of the present, Code. Those require the Magistrate to record a proceeding, and to call upon the parties to give in a written statement of their respective claims as respects the fact of actual possession. The actual possession as to which they are to give in their respective claims must be possession at the time the proceedings are instituted. It would be inconsistent to say that they are to give in statements as to a possession which may be altered, if such proceedings as these are to be allowed, before the Magistrate actually makes the enquiry. Although the Section contains the words relied upon by Mr. Woodroffe that the Magistrate is to declare the party to be entitled to "retain possession," these words cannot, when the other part of the Section is looked at, be considered as showing that it was to be the possession which there was at the time he came to his decision. Act IV of 1840 contains the same words in the second Section, and they are followed by a provision which shows that the Legislature contemplated that it might become necessary for the Magistrate, not simply to declare a party entitled to retain possession, but to restore him to possession.

If we consider what the Magistrate has to do, there is no impropriety in the use of the words "retain possession." He has to declare the party entitled to retain that which

he had at the time of the institution of the proceedings, and as to which the written statement would be laid before him. This case affords an example of what the consequences would be if any other construction were put upon this provision of the law. It would encourage persons, after the proceedings had been instituted, and after a statement of the claims had been laid before the Magistrate, to carry on a violent contest for the possession, so as to appear to be in possession when the Magistrate concluded his enquiry. Instead of being a wholesome law and calculated to prevent breaches of the peace, it would be calculated to induce persons to continue to commit breaches of the peace.

Looking at what the Assistant Commissioner has said in this order of the conduct of the persons employed by the applicant, the second party, it is somewhat surprising that he should have ventured to come to this Court. No illegality or impropriety is shown in the order of the Magistrate. Indeed, it rather appears that the object of making this application was not on account of any illegality or impropriety that was likely would be shown in it, but to get the proceedings generally before this Court and have them reviewed as to matters that are to be determined by the Magistrate, and which the applicant has no right to have discussed in this Court.

The 18th July 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Hât—Breach of the Peace—High Court—Judicial Proceeding—Act X of 1872 ss. 297 & 518.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Officiating Sessions Judge of Backergunge.

Bholanath Bose

versus

Komuruddin.

In a case in which the Magistrate passed an order under s. 518 Code of Criminal Procedure for closing a

hât on the ground that it was only a mile apart from another hât, and a breach of the peace was not unlikely, the Sessions Judge recommended that the order should be set aside, s. 518 applying only when a breach of the peace was imminent:

Held that, under expl. II, s. 518, the order could be made in all cases upon such information as satisfied the Magistrate, and as the order was one which the Magistrate had power to make and was not contrary to law, the High Court could not under s. 297 Code of Criminal Procedure set it aside.

Orders made under s. 518 are not judicial proceedings and therefore are not within s. 297.

Reference.—On the complaint of one Komuruddin that a new hât had been established contiguous to his and on the same days of the week, and that breaches of the peace were likely, the Officiating Magistrate passed an order under Section 518 of the Code that the new hât should not be held on these days.

Mr. Morris, the Judge, considered that there was no evidence or information such as could justify the Magistrate in thinking a breach of the peace imminent, and requested him to re-consider his order, or at all events take further evidence.

The Magistrate then deputed a Deputy Magistrate who visited the spot, and reported that as the two hâts were only a mile apart, a breach of the peace might not unlikely happen.

The grounds on which I think the Magistrate's order is erroneous in law are that beyond the opinions of the Deputy Magistrate and the Magistrate himself that, when two rival hâts are held only a mile apart on the same days, a breach of the peace is not unlikely, there is no evidence or information that any breach of the peace is intended by any party, or that any preparation for it has been made, or that one is in any way imminent.

As I understand Section 518 only to apply to urgent cases where delay would frustrate the ends of the law, and that a Magistrate is not justified in acting under it except on information which gives him reason to believe that a breach of the peace is not only a not improbable event, but is actually imminent, I think that the Magistrate's order ought to be set aside.

My reasons are more fully detailed in my order of yesterday's date.

Judgment of the High Court.

Couch, C.J.—This case has been reported to the Court by the Officiating Sessions Judge under Section 296 of the Code of Criminal Procedure, which empowers a Court

of Sessions to do so when it is of opinion that the judgment or order is contrary to law. Section 297 empowers this Court, in a case so reported, if it appears to the Court that there has been a material error in any judicial proceeding in any Court subordinate to it, to pass such order thereon as it thinks fit.

Explanation II of Section 518, under which the order was made, says that the order may in all cases be made upon such information as satisfies the Magistrate, and it has been held by this Court on a reference to a Full Bench in the case reported in X Bengal Law Reports, page 484,* that a Magistrate had power, under the corresponding Section of Act XXV of 1861, to make such an order as has been made in this case. The order which has been reported to us cannot be said to be contrary to law. There is another reason for this Court being unable to pass any order upon it, for Section 520 declares that orders made under Section 518 are not judicial proceedings, and they are, therefore, not within Section 297.

The 26th July 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Opium—Possession—Act XXI of 1856 s. 53.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Officiating Magistrate of Monghyr.

The Queen

versus

Gunesh Mana, Prisoner.

Where opium was found in the possession of a person who was a servant of the accused, and who alleged that he obtained it from the wife of the accused, and that the wife had purchased it from an opium cultivator, it was held that the accused could not be convicted under s. 53 Act XXI of 1856, as it had not been shown that the purchase by his wife was authorized by

the accused, and therefore her possession of the opium or that of the servant could not be considered the possession of the accused.

Reference.—GUNESH MANA is a maddad-vendor at Jumalpoore, and he holds a license from Government. On the 26th June a boy (servant of Gunesh) by name Bandha was caught by Bhim chowkidar of Jumalpoore with 5½ tolahs of opium in his possession. When asked, this boy said that the opium had been given to him by one Rajcoomari, the wife of Gunesh, with the order to take it to Gunesh. The opium, according to the boy's statement, had just been purchased by Rajcoomari from one Mussamut Pancho, wife of Phul Chund, an opium cultivator.

The case was tried by the Joint Magistrate of Monghyr who sentenced Gunesh under Section 53 Act XXI of 1856. The sentence was that Gunesh pay a fine of Rs. 50, or in default of payment undergo two months' imprisonment; order was also passed for the cancelment of Gunesh's license. In passing this sentence, the Joint Magistrate held that the opium found on the boy Bandha was opium other than opium supplied from the Government stores, and that it was bought by Rajcoomari for the use of her husband Gunesh, although Gunesh himself had never seen it.

It appears to me however that the order of the Joint Magistrate was an illegal order. The purchase of the opium by Rajcoomari and the finding of the opium in the possession of the boy Bandha does not in my opinion render the accused Gunesh liable under Section 53 of Act XXI of 1856; that is to say, that it has not been proved that Gunesh had in his possession any opium other than opium supplied to him from the Government stores.

I am of opinion therefore that the order of the Joint Magistrate should be set aside by the High Court.

The accused having paid the fine is at present at large.

Judgment of the High Court.

Couch, C.J.—The order of the Joint Magistrate must be set aside. It not being shown that the purchase by Rajcoomari was authorized by Gunesh, her possession of the opium or that of the boy Bandha cannot be considered the possession of Gunesh so as to make him liable under Section 53 of Act XXI of 1856.

* 18 W. R., Crim., 47.

The 21st May 1873.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, Judges.

High Court—Revision—Obstruction in Public Way—Nuisance—Charge—Act XLV of 1860 ss. 283, 291.

(Criminal Revisional Jurisdiction.)

In the Matter of Mohesh Chunder and others, Prisoners.

In exercise of its powers as a Court of Revision, the High Court quashed convictions by a Joint Magistrate and Assistant Magistrate of certain persons for offences under s. 283 (danger, obstruction, or injury to any person in a public way or line of navigation) and s. 291 (repeating or continuing public nuisance) of the Penal Code, in which it appeared that the complainant's statement was not made on oath or before a Magistrate, and in which there was no statement of charge or evidence of any kind.

Before a conviction can be had of committing a public nuisance under s. 291, there must be proof that there was a previous conviction of an offence and an injunction by a public servant to desist from continuing such nuisance.

Jackson, J.—ALL these cases are cases in which the parties were convicted before the Joint Magistrate or the Assistant Magistrate of Dinagapore, of offences under Section 283 and Section 291 of the Indian Penal Code. The proceedings having been called for, it has been thought advisable to submit them to revision.

The cases may be classified under two heads:—firstly, those dealt with under Section 283; and, secondly, those dealt with under Section 291. Section 283 says:—"Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction, or injury to any person in any public way or public line of navigation, shall be punished with fine which may extend to Rs. 200."

In respect of the nine cases,* of which the

* Before the Joint Magistrate.

No. 1551.—Mohesh Chunder.	...	As. 4
A red goat straying on road	...	
No. 1553.—Nudalyo Behra.	...	" 2
Relieving call of nature by exposure of person on a public road	...	
No. 1554.—Golam Mahomed.	...	" 4
White goat straying on road	...	
No. 1555.—Gadobe Bewah.	...	" 2
White goat straying on road	...	
No. 1574.—Doorgut Poljee.	...	" 2
White goat straying on road	...	
Before Assistant Magistrate.		
No. 1796.—Pooroo Rajbungshee.	...	" 4
Obstructing road of Alwakhowa	...	
No. 1798.—Bahadoor and others.	...	" 4
Ditto ditto ditto	...	" 4
No. 1799.—Nakoo Telee.	...	" 4
Ditto ditto ditto	...	" 4
No. 1801.—Palandii.	...	" 4
Ditto ditto ditto	...	" 4

particulars are subjoined, there is no evidence and no definite statement of the charge imputed in any one case, but there is a paper, called "the first information of a cognizable crime," reported at some Police-station, at the foot of which there are two or three lines of writing headed "complainant or informant's statement," which statement does not appear to be made on oath or before a Magistrate, and where the words are these or nearly to this effect:—"I, Police officer, state that a white he-goat, or a cow, or a bullock, as the case may be, belonging to the accused, was feeding on such a road, and I have brought it with me." This is absolutely all, and upon these materials the accused person is convicted of an offence,—at least so it would appear from the filling up of certain formal statements of offences under Section 283 of the Indian Penal Code,—and variously fined 4 annas or 2 annas as the case may be. There is this difference, however, to be noted in these cases that, in regard to the persons brought before the Joint Magistrate it is stated in each case that the defendant admits, and he is thereupon fined. What he admitted, or how the circumstances admitted amounted to an offence under Section 283, does not appear. In respect of the persons brought before the Assistant Magistrate, there is neither admission nor anything else. It may be quite possible that the parties charged had rendered themselves liable under some municipal or other law to a penalty, and the goat or the ox straying might have been seized and impounded; but it does not appear in any one of these cases that there is any ground for conviction under Section 283, nor even if any ground were alleged, would it be possible to uphold the conviction upon such materials as are those before us.

We then come to the ten cases* in which the parties have been convicted, upon precisely similar procedure, of offences under Section 291 of the Indian Penal Code. That

* Before Joint Magistrate.

No. 1552.—Nooroo Paik.	...	As. 8
Relieving call of nature by exposure of person on the banks of Ghagra Nuddee	...	
No. 1556.—Hurry Narain.	...	" 4
Ditto ditto on Darjeeling road	...	
No. 1593.—Jahir Mahomed.	...	" 4
Ditto ditto on banks of Ghagra Nuddee	...	
No. 1594.—Pala Nushyo.	...	" 4
Ditto ditto ditto	...	" 4
No. 1596.—Ramkisto Thakoor.	...	" 8
Ditto ditto on Darjeeling Road	...	

Before Assistant Magistrate.

No. 1790.—Meher Ali and others.	...	" 2
Dirtying place at Alwakhowa	...	

Section is as follows:—"Whoever repeats, or continues, a public nuisance, having been enjoined by any public servant, who has lawfully authority to issue such injunction, not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both." That is a Section which contemplates somewhat serious offences,—that is, the case of persons who having been ordered by any lawful authority to desist from a public nuisance persists in committing such nuisance. In these cases also, there is neither any statement of charge formal or informal, nor evidence of any kind. Before the Joint Magistrate we find a stereotyped form that the defendant admits. What the defendant admitted, or whether he was aware that he was pleading guilty to the commission of an offence under this Section, is not anywhere stated. The matter stated at the foot of the Police report is generally in these terms:—That the defendant, exposing his person on the Darjeeling road, was relieving the call of nature, or the like act on the bank of a certain Nuddee. This statement applies to five of the ten cases; but in regard to five others, also coming under Section 291, the statement made at the Police-station is merely "মেলাৰ নিদৰ্শ স্থানে ময়লা কৰা," dirtying certain place appointed for the *mela*. These persons may very possibly have rendered themselves liable to some penalty, and we would by no means insist upon any particular formality in respect of trivial offences which may be of frequent occurrence, and of which the penalty is very small; but these parties have been found guilty of a serious offence, and the conviction to which they thus render themselves liable may be afterwards used against them. Where parties are so dealt with, it is necessary that the formalities should be duly observed. In not one of the cases coming before us on the present occasion are the facts stated with any degree of detail, and it does not appear whether the persons convicted really deserve the punishment inflicted on them; and as to the ingredient absolutely necessary in these cases, *viz.*, the previous commission of an offence and injunction by a public officer, it is altogether absent. In some of the cases

under Section 283, I should mention the charge as stated at the Police-station is merely "আলওয়া খোওয়ার মেলাৰ নিদৰ্শ স্থানের রাস্তা বন্ধ করা," which means, obstructing the road of the *mela* of Alwakhowa; and upon this there is a simple order of the Assistant Magistrate that the defendants be fined 4 annas each. This is, properly speaking, no offence at all. One* only of the cases, which have come before us, requires to be separately noticed. It is that in which certain persons, named Subroo, Goorbeen, and others, have been convicted, also under Section 283, and fined in various sums of Rs. 10 or Rs. 5 each. In this case some evidence has been recorded, and the accused persons are examined. These persons appear to have been charged with gambling in a public place, and have been examined with reference to that charge. The evidence also goes to show that one of the persons charged was playing. It does not appear that any money was risked, but simply that Subroo was playing, and a number of persons was present. One of the witnesses says Goorbeen was also playing; two mention Jehan Khan as standing there; one names Kandura and Gurburee as being present; but none of these persons is implicated as either playing or joining in any offence whatever. They have all been convicted under Section 283 of doing an act which causes danger, obstruction, or injury to any person in the public way, and sentenced to fine and imprisonment in default of payment of fine. There is absolutely no evidence upon which these persons could be convicted either under Section 283 or under any other Section, and the formalities which have been observed in the case only tend to show more distinctly the absence of any real ground for the prosecution.

We notice as curious that with the papers in this case is a vernacular note, in which appear the initials of the Assistant Magistrate, wherein it is stated that Subroo is fined Rs. 10, Gurburee Rs. 5; and Kandura, Jehan Khan, and Goorbeen Rs. 8 each; whereas, in the decision written by the same Assistant Magistrate, Subroo is ordered to pay a fine of Rs. 10, or in default to be rigorously imprisoned for a month; Goorbeen is ordered to pay a fine of Rs. 5, or in default to be rigorously imprisoned for 14 days; and the other prisoners are fined Rs. 5 each, or in default ordered to be detained in custody for three days, and this and the sentence as given in

No. 1792.—Gudadhur Dass and others.	
Dirtying place at Alwakhowa	As. 2
No. 1793.—Hedla Nushya.	
Ditto ditto ditto	" 2
No. 1795.—Nittanno Nushyo and others.	
Ditto ditto ditto	" 2
No. 1600.—Ram Pudarut Roy.	
Ditto ditto ditto	" 2

* No. 1737.—Subroo and others.

the vernacular note have been sent up to this Court by the Magistrate of the District with his letter No. 491 dated the 3rd April. This discrepancy appears to call for an explanation, and as the proceedings in these cases appear to be not only informal but radically vicious, we think it right to quash the several convictions, and direct that the fines, where practicable, be returned to the parties.

The 28th July 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Land Dispute—Possession—Evidence—Ameen's Report—Act X of 1872 s. 530.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Sessions Judge of Shahabad.

The Queen

versus

Soumber Ahir.

In a dispute for possession of land under s. 530 Act X. of 1872, the written report of an Ameen who was deputed to hold a local enquiry is not sufficient by itself to justify an order retaining a party in possession until ousted by due course of law.

Reference.—In a suit for possession, Section 530 Act X of 1872, the Deputy Magistrate has passed his final order directing 1st party to be kept in possession.

The grounds of the order are as follow:—
“The Court depending upon the Ameen's report” (an Ameen had been deputed for a local enquiry) “directs that the 1st party should retain possession upon the land until ousted by due course of law.”

The Deputy Magistrate has erred in his order by taking the written report of the Ameen only as proof sufficient on which to form his judgment.

Such judgment should have been passed on evidence, not on a written report unattested, and no other evidence. The order should be reversed and the case returned for re-trial.

I have referred the matter to the Deputy Magistrate for his report, and he admits that he was in error and would have admitted re-trial if possible.

The recd is accordingly transmitted to the High Court for their orders.

Judgment of the High Court

Couch, C.J.—The order of the Deputy Magistrate must be annulled, and he must be directed to re-try the case.

The 1st August 1873.

Present :

The Hon'ble F. A. Glover and E. G. Birch, Judges.

Breach of the Peace—Security—Act X of 1872 s. 491.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Sessions Judge of Mymensingh.

The Queen

versus

Abdool Huq.

To justify an order under s. 491 Act X of 1872, calling on a person to give security to keep the peace, there must be a reasonable probability of a breach of the peace being committed, and not merely a bare possibility of a breach of the peace.

Glover, J.—THE Deputy Magistrate's order in this case must be set aside. The Judge ought, we think, in the first place, to have called upon the Deputy Magistrate for an explanation. He might have had some reason to give in defence of his judgment. As to the judgment itself, we think it is undoubtedly wrong. In the first place, the Section authorizing a Magistrate to call upon parties for security to keep the peace, refers to cases where there is a “likelihood” of a breach of the peace being committed. Of course this must mean a reasonable likelihood, a reasonable probability that there will be such breach. In this case, the Deputy Magistrate says that it was “just possible” under the circumstances that a breach of the peace might take place. We think that is not sufficient; there must be something more than a “bare possibility;” there must be a reasonable likelihood of a breach of the peace taking place, before a Magistrate can call upon any one to give security.

As to Abdool Huq, he was the complainant, but the Deputy Magistrate disbelieved his evidence, and, thereupon without calling upon him to show cause, put him into the position of defendant, and at once ordered him to enter into security to keep the peace. The explanation to Section 492 though it

provides that, when the parties are present in Court, no summons is necessary, still says that the person to whom a summons would have been issued must have an opportunity to show cause why he should not be bound over to keep the peace. Abdool Huq had no opportunity given him of showing why he should not be bound, but was at once made to give security himself. Many rulings of this Court have laid it down that, before Section 492 can take effect, the party who is to be called upon to give security must have an opportunity of showing cause against the order.

The 13th August 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

*Jurisdiction—Civil Court—Evidence—
Illegitimate Child.*

*Reference to the High Court under Section
296 of the Code of Criminal Procedure
by the Judicial Commissioner of Assam.*

Subad Domni

versus

Katiram Dome.

A Civil Court has no jurisdiction to make a declaratory order as to the paternity of an illegitimate child.

The High Court declined to interfere with the order of a Magistrate declaring a person to be the father of an illegitimate child, when it appeared that the Magistrate acted upon the sworn testimony of the mother, and that he called before him the person complained of as being the reputed father.

Reference.—In February 1867, Katiram was adjudged by Mr Assistant Commissioner Carnegy to be the father of an illegitimate child to which Subad had given birth, and was ordered to pay Rs. 1-8 a month for the infant's maintenance. In 1870 a second child was born to Subad, maintenance for which also she claimed from Katiram, whom she pronounced to be its father. This accusation Katiram however denied, but in spite of his denial the Deputy Commissioner, Colonel Lamb, without however taking any evidence at all as to the infant's parentage, made an order that Katiram should provide for both the children. The interposition of this Court was thereon sought for, but was refused by Colonel Bivar. Katiram then filed a suit before the Moonsiff at Gowhaty for a declaratory order pronouncing him not to be

the father of the second child, and an order to that effect was passed by the Moonsiff after recording such evidence as was offered to him in Court; besides making a personal local enquiry and taking evidence on the spot. The Moonsiff's decision was appealed against, but was affirmed by me, whereupon an application was made to Colonel Lamb to re-consider his order with reference to those decisions. Intermediately he had passed an order on a petition of Subad's by which Katiram was required to pay Rs. 5 every month towards the support of the two children; but on the application I speak of being filed by Katiram, orders were given that the elder child should be made over to the father for education and support, and that its allowance would stop should the mother not part with it, while in respect to the younger child it was decided that Katiram should continue to pay its mother an allowance for its maintenance at the rate of Rs. 2-8 per mensem, a liability Katiram seeks to escape from.

It is in regard therefore to the orders passed in respect to the younger child that I have the honor to address the Court, for it appears to me that these throughout have been very irregular. In the first instance the Deputy Commissioner seems to have jumped at once to the conclusion that, because Katiram was the father of the elder child, the second one must be his also. No "proof by evidence" was required to be given as to the fact, and no attempt was made to prove it, and in the absence of such proof the award of an allowance to the woman was obviously quite illegal. Nor was the subsequent grant of an increase to that allowance less so, because an alteration in an allowance of the kind is only admissible in the event of a change in the circumstances of either party, and then only on proof that such change has actually taken place, but in this instance change of circumstances was not alleged, or at all events was not proved.

Colonel Lamb's proceedings, then, having been, as it seems to me, quite irregular from first to last, I think they should be set aside, in which event the order of the Civil Court will operate, I presume, as a stay, to further action under the Code of Criminal Procedure on Subad's part.

Judgment of the High Court.

Pontifex, J.—Upon this reference, we are of opinion that the decree of the Civil Court cannot affect the order of the Magistrate, even if the Civil Court had

jurisdiction, which it has not, to make a declaratory order as to the paternity of the child in question.

The Magistrate acted upon the sworn testimony of the mother, and called before him the person complained of as being the reputed father.

The High Court alone can, under the revision Sections, interfere with the order of the Magistrate. To obtain such interference, proof would be required that the Magistrate improperly admitted or rejected evidence.

The 14th August 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

Compensation—Complainant—Evidence.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Magistrate of Monghyr.

Jitan Khan

versus

Durga Singh and others.

In a case in which the complainant charged the accused with cutting and forcibly carrying away his crop of paddy, the Assistant Magistrate directed the crop to be attached, and deputed an ameen to hold a local investigation, and subsequently, after examining the ameen, but without taking the evidence for the prosecution, he held the complaint to be a false one, and ordered that the complainant should pay a compensation to the accused, and that the crop should be made over to the accused.

The High Court set aside the Assistant Magistrate's order, and ordered that the money paid under it should be returned to the complainant, and that the case should be re-tried by a Magistrate after recording the evidence of the complainant and his witnesses.

Reference.—On the 1st May, Jitan Khan filed a complaint before the Assistant Magistrate (Mr. Money) holding second class powers, to the effect that Durga Singh and others, servants of Upinda Nath Mohun Thakur, were about to cut and carry off his *dhan* at Kasimpur, Pergunnah Monghyr, about four miles distant from this station.

The Assistant Magistrate then passed an order for the Police to attach the crop, and he told the parties to deposit Rs. 10 each

in the treasury to pay the expenses of a local investigation, which the Assistant Magistrate ordered.

On the following day, Jitan Khan again appeared and said that Durga Singh and others aforesaid had actually come at 6 that morning, and cut and forcibly carried off his *dhan*.

The accused persons were accordingly summoned by the Assistant Magistrate, and they appeared, together with the complainant and his witnesses, on the 9th May.

On the 9th May, the evidence of the complainant and his witnesses was *not* taken, and the case was postponed *sine die*, pending the result of the local investigation.

On the 18th June, the ameen appeared and filed a map, Exhibit B, and a report, Exhibit C. The ameen was examined, and he stated that the field, marked A on the plan, was pointed out by Jitan Khan as the field in dispute, and that it consisted of 6 beegahs and 18 cottahs.

Before the Assistant Magistrate, however, it appears that the complainant said the field in dispute was *bounded on the north by the Ganges*, and consequently the Assistant Magistrate held that the land, marked B on the plan, was the land regarding which the complaint was originally made, and that as the complainant pointed out a different place (*viz.*, that marked A) to the ameen, the charge must be a false one.

The Assistant Magistrate then, without examining complainant's witnesses, passed the following order:—

"Plaintiff to pay Rs. 5 each compensation to the four defendants, and to pay the whole of the expenses of the ameen. The Rs. 10 deposited by the defendants for the ameen to be restored to them, and the crops attached to be made over to the defendants."

It is urged by Posun Lall, mookhtear for the complainant, that his client, Jitan Lal, did actually point out the plot marked on the map B, as well as A, to the ameen, and that this is manifest from the original petition, where complainant talks of *hundreds* (*sadha*) of beegahs of disputed land. However this may be, it appears that the Assistant Magistrate was not, under Explanation 3, Section 215, Code of Criminal Procedure, justified in passing an order of discharge, until he had taken the evidence for the prosecution.

The Assistant Magistrate, moreover, was not competent to award compensation in

such (warrant) case, award of compensation to accused persons being confined to summons cases. The Assistant Magistrate, moreover, had no authority to pass an order to the Police to attach the crops, and in such a case to order the complainant to pay the whole of the ameen's expenses.

It may not be out of place to remark that the complainant is a servant of Phulchund, the malik of Kasimpur, the boundary line of which, according to the dearah survey of 1865, is marked by the green line on the ameen's map, but it appears that Phulchund claims the land as an accretion to his estate.

The defendants are servants of the zemindar across the boundary, so that in fact the case is probably one which is properly cognizable by the Civil Court, and not the Criminal Court.

The notes to Section 115, Prinsep's Code of Criminal Procedure, leaves it doubtful whether I, as Magistrate, have power to order the trial of a person discharged in a warrant case. I think that even if I have power to order the re-trial of this case, it would be beyond my power to interfere with the order of the Assistant Magistrate awarding compensation to the accused. Consequently, the case will be submitted to the High Court, in order that the illegal orders of the Assistant Magistrate may be quashed, and, if the High Court think proper, that the case may be re-tried. Mr. Money has left the station, and as no successor to him has been appointed, the case, if the High Court think proper, may be made over to some other Magistrate.

I must not omit to mention that I am informed by the Assistant Magistrate that the order for the parties to deposit Rs. 10 in payment of the ameen's expenses, was given by my verbal advice one day when he called in at my office, and mentioned that a case of disputed right to crops was pending before him. Although I do not recollect the circumstance, I have no doubt that the Assistant Magistrate's assertion is correct, and all I can say is that such advice must have been given under misapprehension of the real facts of the case.

Judgment of the High Court.

Kemp, J.—The order of the Assistant Magistrate is quashed, and any money paid under it must be returned to the complainant. The case must be re-tried by a Magistrate, the evidence of the complainant and his witnesses being duly recorded.

The 16th August 1873.

Present :

The Hon'ble F. B. Kemp and C. Pontifex,
Judges.

*Jurisdiction—Mischief—Criminal Trespass—
Civil Action.*

*Reference to the High Court under
Section 296 of the Code of Criminal
Procedure by the Magistrate of My-
mensingh.*

Sheikh Koreem Bux

versus

Sheikh Hoormut and others.

Where a Joint Magistrate dismissed a case in which the complainant charged the accused with illegal assembly, criminal trespass, and mischief, on the ground that the case was one completely for the Civil Court, the High Court set aside the order, and directed the Joint Magistrate to try it.

Reference.—On the 23rd May, Koreem Bux laid a complaint before the Officiating Joint Magistrate, alleging that Sheikh Hoormut and others, in all 28 persons, had maliciously spoiled his rice-field, doing damage to the value of about Rs. 45. Before issuing process, the Joint Magistrate directed, under Section 146, that the complainant should bring four witnesses within ten days to corroborate his statement. The examination of these witnesses was not reduced to writing: but I understand that they attended and were questioned, and thereupon the Joint Magistrate, on the 31st May, issued a summons against Hoormut Sheikh, and fixed the 13th June for the hearing. The accused not being present on the day of hearing, the Joint Magistrate issued a warrant for his arrest, returnable on the 25th June, and directed the plaintiff to be in attendance on that date. On the 14th June, the accused Hoormut attended and was admitted to bail. The Joint Magistrate was unable from press of work to take up the case on the 25th June, and on the two following days he was ill, in consequence of which the case was adjourned to the 9th July. It was not, however, taken up till the 10th, when the evidence of the complainant and of one witness was taken, after which the Joint Magistrate recorded an order that he considered this completely a civil case, and therefore referred the parties to the Civil Court.

This order seems to me to be erroneous in point of law, and I think it should be set aside, and that the Joint Magistrate should be directed to try the case.

The complainant's charge was one of illegal assembly, criminal trespass, and mischief. I think it a mistake to say that a case involving charges of this kind was completely a civil case. It was in evidence before the Joint Magistrate that the defendant Hoormut had already brought a suit in the Civil Court to obtain possession of this land, and that his suit had been dismissed. I therefore think that there were no grounds for holding that Hoormut was acting in good faith, and that he believed himself entitled to enter upon and plough up the field. I therefore beg to submit the case for the orders of the Honorable High Court.

Judgment of the High Court.

• *Kemp, J.*—We concur with the Magistrate.

The order of the Joint Magistrate dismissing the case is quashed, and he is directed to try it.

The 29th August 1873.

Present :

• The Hon'ble F. A. Glover and C. Pontifex,
Judges.

High Court—Questions of Facts—Sentence—Order—Judgment—Act X of 1872 ss. 294, 297.

(Miscellaneous Case.)

The Queen

versus

J. R. Belilios, *Petitioner.*

The Advocate-General for the Prosecution.

Mr. J. T. Woodroffe for the Petitioner.

Section 294 of the Code of Criminal Procedure is limited to sentences and orders as distinct from judgments. The former may be altered or set aside by the High Court for illegality or impropriety; but the latter cannot be interfered with (except in such cases where the law gives an appeal on the facts) unless it be shown that there has been some material error of law which renders the conviction illegal and improper in law.

Where a Sessions Judge after a careful and deliberate weighing of the evidence on the record comes to a conclusion unfavorable to the accused, the High Court is not justified in interfering under s. 297 Code of Criminal Procedure, however much it might hold a contrary opinion as to the value of the evidence.

Glover, J.—The accused has been convicted by the Sessions Judge of the 24-Pergunnahs, on appeal from the District Magistrate of Alipore, of cheating under Section 417, Penal Code, and has been sentenced to six months' rigorous imprisonment and a fine of Rs. 1,000 commutable to further rigorous imprisonment for six months. Certain moneys also Rs. (2,000) which had been deposited in Court with a view to compromising the case, were held by the Judge to be part of the property acquired by cheating, and were ordered to be given over to the prosecutor Kalidass.

Mr. Woodroffe for the accused Belilios contends that the Judge's proceedings were irregular, and that he committed various illegalities in the conduct of the trial which materially prejudiced his client's defence. Mr. Woodroffe also contends that, under the provisions of Section 294, Code of Criminal Procedure, this Court can go into the whole case, and decide whether the judgment of the Court below has been warranted by the evidence.

It will be convenient, I think, to consider the last objection first. By Section 294 we are empowered to consider the legality or propriety of *any sentence or order passed*; by which I understand that an illegal or improper sentence or order may be set right by the High Court; as for instance, where a man is sentenced to seven years' rigorous imprisonment for the offence of hurt, or when a man is called upon to furnish security to keep the peace without any evidence having been taken as to the likelihood of a breach of it. Here the sentence and order would have been illegal and improper, and this Court would have applied a remedy under the Section.

But the Section does not say that the High Court may consider the propriety of the *judgment* passed by the Court below; and that the omission in Section 294 was intentional is, I think, shown by the wording of Section 296 which allows a *judgment* by a Subordinate Court to be reported on by a Sessions Judge or Magistrate to the High Court when it is contrary to law. A great difference is made between "sentences or orders" and "judgments,"—the one may be altered or set aside for illegality or impropriety, the other can be reversed for illegality alone.

And were it not so, it would be difficult to understand the meaning of Section 286. That Section limits the hearing of appeals, but if the word "propriety" allows this Court to

take up every case of revision from a Sessions Judge and decide it on its merits, it would give an appeal, which the law nowhere contemplates, viz., a second appeal on the facts from the decision of the Magistrate who originally tried the case.

This, it seems to me, is an unanswerable objection to the meaning which the learned Counsel would place on the terms of Section 294. That Section is, I consider, limited to sentences and orders as distinct from judgments, and that the latter cannot be interfered with (except in such cases where the law gives an appeal on the facts) unless it be shown that the judgment is contrary to law.

But then it is contended that there have been illegalities in the judgment. These are said to be the Deputy Magistrate and the Judge's refusals to allow certain witnesses to be cross-examined, and their rulings that certain communications made to some of those witnesses were privileged.

The Advocate-General has very fairly admitted that he is not prepared to support the Judge's decision on these points, and there can be no doubt, I think, that the accused ought to have been allowed an opportunity of cross-examining, and that the communications between Sims and his clerk were not privileged. But after all, what does the objection amount to? The answers which the accused expected or hoped to elicit from these witnesses had reference to the prosecutor's original statement that the money had been lost by gambling, and both Sims and his clerk admitted clearly that Kalidass had made that statement. The other witnesses could have done no more, and the Judge took the point into careful consideration and with a full perception of the improbabilities attaching to the prosecutor's story. He weighed the evidence of the Deputy Magistrate, Koer Harrendra Krishna, of Mr. Sims, and of his clerk, admitting that Kalidass' story of the gambling had been told to them, but on the whole thought that "he ought not to find on it" (I use the Judge's own words) "that there was any gambling."

Allowing, therefore, that the Judge was wrong in not permitting certain examinations and in not insisting on the recall of certain witnesses, can it be said that there has been any "material error" in his "proceedings" such as is required by Section 297?

But it is contended, further, that the evidence on which the Judge relied was so manifestly insufficient for conviction that the result has been a failure of justice, and that this amounts to a "material error in the

judicial proceedings" of the Court below, such as to allow of our interfering under Section 297, and of annulling the judgment.

But I am by no means prepared to go this length. I do not think that I should have convicted the accused Belilios on the evidence to be found on this record. His testimony was entirely uncorroborated, and was, moreover, inconsistent with his previous acts, besides being highly improbable. Still I cannot say that the Court below was undoubtedly wrong in believing Kalidass' evidence or in allowing so little weight to that of Mr. Sims and his clerk. The Judge (an officer of unquestioned ability and long experience) had these witnesses before him, and so had advantages in forming an opinion which this Court cannot have; and if he, after a careful and deliberate weighing of that evidence, came to a conclusion unfavorable to the accused, I do not think that this Court would be justified in interfering under Section 297, however much it might hold a contrary opinion as to the value of the evidence.

One portion, however, of the Sessions Judge's decision must be altered. The Advocate-General, on the part of the Crown, has admitted that the order of the Sessions Judge directing the payment of the Rs. 2,000 previously deposited by Zuhuruddeen to Kalidass cannot be sustained, and there is certainly nothing on the record whereby the accused can be in any way connected with this money, or to show that the Rs. 2,000 formed any part of the sum obtained by the cheating. So much therefore of the Sessions Judge's order must be set aside, and the money will be returned (if it has been paid to the prosecutor) to the party by whom the money was deposited, or to his representatives.

With this exception I hold that no ground has been made out for our interference, where we have jurisdiction to interfere, and that on the merits of the case we have no power to interfere at all.

I would, therefore, reject this application. The accused must surrender to his bail, and be committed to jail to undergo his sentence.

Pontifex, J.—The record in this case was called for under Section 294, Criminal Procedure Code, upon an application made by the petitioner stating that irregularities had occurred in the proceedings of the Courts below sufficient to induce this Court to satisfy itself as to the legality or propriety of the sentence passed by the Lower Court. The

irregularities complained of were as follows:—
1st, that the Lower Court had directed payment to the prosecutor of a sum of Rs. 2,000 standing in deposit, and over which it had no jurisdiction; 2ndly, that certain questions proposed to be asked by the defendant's Counsel of some of the prosecutor's witnesses, had, on the alleged ground of privilege, been stopped by the Court: and that two witnesses, who had been examined for the complainant in the original investigation before the Magistrate, had not been produced for cross-examination by the prisoner.

With respect to the first irregularity, the Advocate-General has conceded that the Lower Court had no jurisdiction to deal with the Rs. 2,000, and the order of the Lower Court must be modified so far by directing the refund of the Rs. 2,000 to the person (or his representatives) who, in pursuance of the order of the Lower Court, paid that sum, if it has been paid, to the prosecutor.

With respect to the questions proposed by the prisoner's Counsel having been stopped on the ground of privilege, the fact is that, in the Lower Appellate Court, the questions which had originally been stopped were put and answered: and with respect to the prisoner not having had the opportunity of cross-examining two of the original witnesses for the complainant, it is sufficient to say that the Lower Court has not relied on either of those witnesses, and its decision would undoubtedly have been the same if those two witnesses had never been examined.

But it has been argued on behalf of the prisoner that the record in the case having, on proper and sufficient grounds, been called for and examined by this Court, we may now apply ourselves to the whole evidence in the Lower Court, and, if we consider the conviction improper, we may, under Sections 294 and 297, reverse it and pass such judgment, sentence, or order as we think fit.

I am of opinion that, under Section 294 we have no power to interfere with the conviction, unless there has been some material error of law which renders such conviction illegal and improper in law.

I am further of opinion that there has not, in this case, been any such material error in law as would authorize us to interfere with the conviction; and if the conviction stands, I cannot say that the sentence is an improper one for the offence of which the prisoner has been convicted.

Upon first hearing the evidence, I was strongly inclined to think that I should not

myself have considered it sufficient for a conviction; and even now, if I were trying the prisoner on the evidence taken in the Courts below, I should myself discharge the prisoner on the ground that the evidence was not sufficient for his conviction. But I am bound to say that, after a careful perusal of all the papers in the case, the judgment of the Court below does not seem to me to rest upon such a weak foundation of evidence as I at first supposed. I think there can be no doubt upon the evidence that the prosecutor did own some share or interest in Indigo Factories. It is immaterial to the propriety of this conviction whether such Indigo Factory, or the prosecutor's interest therein, was of the value of Rs. 80,000. The questions are, has the prosecutor any interest in any Indigo Factory, and did he attempt to sell such interest for Rs. 80,000?

There is certainly evidence on both those points, and on that evidence the Court below, which is under the law the proper tribunal to come to a final decision on the facts, has convicted the prisoner. With such conviction, therefore, we cannot interfere, and except with respect to the Rs. 2,000, which will be re-paid as before mentioned, the sentence of the Lower Court will stand.

The 9th September 1873.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges*.

High Court—Procedure—Medical Evidence—Culpable Homicide—Grievous Hurt—Act X of 1872 s. 297.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Officiating Magistrate of Burdwan.

The Queen

versus

Harish Pal.

In a case in which the accused caused the death of a woman by beating, the medical officer who held the *post mortem* examination considered that death resulted from rupture of the spleen, but the Civil Surgeon said that no opinion of the cause of death could be formed.

The accused having been convicted of causing grievous hurt, and sentenced to six months' rigorous imprisonment by the Deputy Magistrate, the Magistrate considered that the accused ought to have been committed to the Sessions on a charge of culpable homicide, but recommended that the High Court should enhance the sentence which had been passed to one of sufficient severity to meet the offence.

HELD, that the High Court could not deal with the case in the mode suggested; but under s. 297, Code of Criminal Procedure, the Court annulled the conviction by the Deputy Magistrate and directed that the accused should be committed to the Sessions on charges of culpable homicide and of grievous hurt.

Reference.—THE accused Harish kept the deceased Khirodmoni as his mistress. On the 21st June last Khirodmoni abused him for not ploughing some ground, and he retorted by giving her a beating, which was immediately followed by her death. The eye-witness Anondmoyee describes the beating thus:—"He seized her by the hair and dragged her down from the verandah into the yard, and there kicked and thumped her with his fists on the stomach and on the back. Still beating her he dragged her up to the outer gate of the bari" (8 cubits) "and then he took her up under his arm and brought her back. She appeared to be dead. She was fanned, &c., but never revived." This evidence is corroborated by that of Gholam and Tara Chand who saw him dragging her along on her hands and knees and beating her, and who stopped him from beating her more. At the *post mortem* examination the body was found much decomposed, and no marks of blows were found, but the ninth rib on the left side was found fractured; the spleen ruptured on its concave side; and much blood extravasated in the left side of the abdominal cavity. The Sub-Assistant Surgeon who made the *post mortem* examination on 23rd June was of opinion that death resulted from rupture of the spleen, but the Civil Surgeon on reviewing that report noted that it is very easy to rupture a decomposed spleen, and that he would say that no opinion of the cause of death could be formed.

This being the state of the case for the prosecution, and the defence (of enmity and death from natural causes) being disbelieved, the accused was convicted of causing grievous hurt and sentenced to six months' rigorous imprisonment by the Deputy Magistrate of Cutwa.

I think that the accused ought to have been committed to the Sessions on a charge of culpable homicide, because (1) notwithstanding the Civil Surgeon's opinion, I do not think there can be any doubt that the beating caused the death, and (2) because I think the accused, who inflicted such a lengthened and savage beating upon the most tender parts of the body of a woman, that woman too having suffered from fever as he admits, must have had the knowledge

that he was likely by such beating to cause her death.

But as the commitment of the case to the Sessions will involve great inconvenience to the witnesses, I venture to suggest that perhaps the requirements of justice might be met by simply raising the sentence of six months' rigorous imprisonment to one of such severity as may seem adequate to the offence committed.

Judgment of the High Court.

Jackson, J.—We do not think it would be proper to deal with this case in the mode suggested by the Magistrate of the district. But, under the provisions of Section 297, Code of Criminal Procedure, we annul the conviction of the prisoner by the Deputy Magistrate of Cutwa, and direct that he be committed to take his trial before the Court of Session on charges of culpable homicide and of grievous hurt.

The evidence of the medical officer will be regularly taken in the Court of Session, and a proper sentence passed by that Court.

The 11th September 1873.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, Judges.

Nuisance—Fine—Municipality—Act III (B.C.) of 1864 s. 65.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Magistrate of 24-Pergunnahs.

The Chairman of the Municipal Commissioners for the Suburbs of Calcutta,

versus

Aneesuddeen Menh, Accused.

In a case in which accused was convicted of a nuisance under s. 66 Act III (B.C.) of 1864 and sentenced to pay a fine of Rs. 10, and further fined Rs. 2 a day for every day the nuisance continued unabated, the High Court (following a precedent cited) set aside only so much of the order as directed the fine prospectively.

Case of Sagore Dutt (foot-note at page 44 of 18 W.R., Cr. Rul.) distinguished.

Reference.—UNDER Section 296 Act X of 1872, and Circular Order of the High Court No. 18, dated 15th July 1863, I herewith transmit the records of this case to be laid before the High Court with the following reference:—

The defendant was, on the 18th July last, convicted before a Bench of Magistrates for

infringing the provisions of Section 66 Act III of (B.C.) 1864, in that he had kept on his laud some bones more than 24 hours otherwise than in a proper receptacle. The Bench found him guilty and sentenced him to pay a fine of Rs. 10, and further ordered him to remove the bones in three days, or in default to pay a fine of Rs. 2 for every day the nuisance continued unabated.

It appears to me that, in accordance with the rulings of the High Court in the cases noted in the margin, the latter part of the conviction is bad, as being in fact an adjudication in respect of an offence which had not then been committed. As such an order vitiates the entire conviction, I submit the proceedings with a view to their being quashed, should the High Court think this course necessary.

In re W.N. Love; In re Sagore Dutt, 18 W.R., 44, Cri. Rul.

Judgment of the High Court.

Jackson, J.—We think it proper to follow the precedent given at page 44, XVIII W. R., Criminal Rulings (W. N. Love, Petitioner). In the case mentioned in a footnote on the same page (Sagore Dutt), the Court had before it a conviction before Justices regulated by the English law and which "could not be amended."

We set aside so much of the order before us as inflicts a fine prospectively of "Rs. 2 for every day the nuisance remains."

The 13th September 1873.

Present:

The Hon'ble F. A. Glover and E. G. Birch,
Judges.

Municipal Law—License—Making Bricks—Act III (B. C.) of 1864, s. 77.

(Miscellaneous Case.)

Sriram Chunder Halder, *Petitioner,*

versus

The Chairman of the Howrah Municipality,
Opposite Party.

Baboo Bhowanee Churn Dutt for the
Petitioner.

Baboo Juggadanund Mookerjee for the
Opposite Party.

Section 77 of Act III (B.C.) of 1864 refers to the burning of bricks for trading purposes, and not to cases where bricks are made for the particular use of the person burning them: such person need not take out a license for that purpose.

Glover, J.—We think that this rule must be made absolute. The Junior Government Pleader, who has appeared on behalf of the Chairman of the Municipality, says that no one is permitted to make bricks whether for his own sake or for sale without first taking out a license. The only Section of Act III (B.C.) of 1864 which could be applied to this case refers to making bricks, or doing other things, with reference to trade. There is nothing in the Section which applies to a person making bricks for his own use, or which makes it an offence against the Municipal Regulations so to make them, without first taking out a license. Now the petitioner's affidavit is to the effect that these bricks were used for his own purposes, and that before commencing to make them he got the permission of the Chairman to excavate ground for the purpose. The permission is filed, is signed by the Secretary to the Municipality, and is stated to have been given in the terms of the order; and in that document the petitioner has permission given him to burn bricks for his own use. How, after giving this permission (and there is an affidavit to the effect that the bricks when made were only employed by the petitioner for his own use), the Chairman, or rather the Municipal Commissioners acting under the orders of the Chairman, could have fined the petitioner for burning bricks without a license under Section 77 of the Act, is not easy to see. That Section, as I have said, refers to the burning of bricks for trading purposes, and not to cases where bricks are made for the particular use of the person burning them. It appears to us that this fine has been improperly levied on the petitioner, and that it should be returned to him.

The 15th September 1873.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, Judges.

False Information—Offence—Act XLV of 1860, s. 203.

(Miscellaneous Case.)

The Queen

versus

Joynarain Patro and others, *Petitioners*.

Messrs. J. T. Woodroffe and C. Jackson and Baboos Chunder Madhub Ghose and Nullit Chunder Sein for the *Petitioners*.

Baboo Juggadanund Mookerjee for the Prosecution.

To justify a conviction for giving false information with respect to an offence under Section 203 of the Penal Code, it must be proved, not only that the person charged had reason to believe that an offence had been committed, but that the offence had actually been committed, and that the accused knew or had reason to believe that the offence had been actually committed.

Jackson, J.—THE petitioners, Joynarain Patro and others, have been convicted by the Joint-Magistrate of Diamond Harbour, 24-Pergunnahs, of an offence under Section 203 of the Indian Penal Code and sentenced to various periods of imprisonment; and Joynarain and Mohendronath have also been fined. The accused appealed to the Court of Sessions, but the convictions and the sentences have been upheld by the Sessions Judge. They now apply to this Court by way of revision. The circumstances of the case are so clearly and completely set forth in the judgments of the two Courts below, that it seems unnecessary to re-state them here. They amount to this, that a dead body was found in the premises of Joynarain. Information, which has been found to be false, was conveyed to the police that the person whose body was found, was killed by a blow dealt by Mohendronath, son of Joynarain. An enquiry took place, and the petitioners were asked whether they recognized the body. The body was alleged to be that of Jugoo Mytee, who, it was said, had been a servant of Joynarain. They all denied knowledge either of the body or of Jugoo Mytee, and upon this denial they all of them are considered to have committed an offence under Section 203. There are several objections to this conviction raised by the learned Counsel. The first is this, that in

order to establish an offence under Section 203, it is necessary that there should have been some offence committed; that the accused should have known or had reason to believe that such offence has been committed, and that so knowing or believing or having reason to believe that it has been committed, he should have given some information respecting that offence which he knew or believed to be false. The Magistrate and the Judge have both determined the first part of this question in the negative, and held that it is not necessary that the commission of any offence should be made out so long as the party charged had reason to believe that the offence has been committed. In this opinion I am unable to agree. It appears to me that the object of the Legislature was not to insure general veracity or the making of correct statements in regard to supposed offences, or to offences the commission of which might be falsely or incorrectly reported, but to discourage and punish the giving of false information to the police in regard to offences which had been actually committed, and which the person charged knew or had reason to believe had been actually committed. To carry the interpretation of the Section as far as the Sessions Judge has carried it, would, I think, go very much beyond the intention of the Legislature. In addition to that, I think it right to say—although it is not necessary to do so in this case, and consequently the Government pleader was not called upon to argue this point—that by the words “gives information” is meant, I think, volunteering information, or, at least, the making of positive statements; and that those words do not include such answers to questions as have been given by the accused in the present case. Persons occasionally become aware of the commission of an offence under such circumstances that they may themselves be compromised, though entirely innocent. I do not think that the intention of the Legislature was that the words should apply to the case of persons who, in such circumstances, make answers in fact untrue to questions not connected with the actual commission of the offence, but remotely bearing upon it. I intimate this inclination of opinion without any intention of finally deciding the point, as it has not been argued out.

Then it is said, that as the Judge has not given any opinion in this case whether an offence had been committed or not, we ought to send the proceedings back to his Court, in order that he might come to a positive

conclusion upon that point. I do not think it our duty to do so. The Magistrate himself hesitated to affirm that any offence had been committed, and he declared that he was unable to say what offence had been committed; and looking to all that has taken place before the Magistrate, it appears to us that there is no evidence on which the commission of any offence could be safely found. Nor do we think it right to direct any further enquiry upon that point. I am far from saying that the Joint-Magistrate did not carefully investigate the case. On the contrary, there is ample proof in the judgment to shew that he bestowed a great deal of care and attention upon it; but I must say that there are portions of the evidence which ought to have been received with great caution, and which have been rather too readily received. I refer specially to that portion which relates to the three masons and the two police officers who opportunely visited the tank where the masons were conversing. As far as we can see in this case, specially looking to the circumstance of the discovery of the body by Nobeen Chowkedar, it appears extremely doubtful, as far as the case has gone, whether Jugoo Mytee had been murdered at all. I think the order of the Joint-Magistrate is bad on the point of law, and that the prisoners are entitled to be discharged and to have the fines, if paid, refunded to them.

The 17th September 1873.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

*Discharge—Witness—Prosecution—Act X
of 1872 ss. 215, 351.*

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Magistrate of 24-Pergunnahs.

Soondur Lukur

versus

Ramkumar Sirdar and another.

Under Explanation III, Section 215 of the Code of Criminal Procedure, an order of discharge cannot be passed until the evidence of the witnesses named for the prosecution has been taken.

Where a Magistrate considered that the evidence of a person who was not produced was material, it was held that he should have summoned such person as a witness under Section 351 of the Code.

Reference.—THE case was one of grievous hurt, and was sent up by the police in an A form, and with five witnesses for the prosecution. The Joint-Magistrate, who tried the case, recorded the depositions of only three of these witnesses, and the statement of the Sub-Assistant Surgeon of the Alipore dispensary, and then dismissed the case under Section 215 of the Criminal Procedure Code.

It appears to me that this order was illegal for the following reasons:—

1st.—Explanation III, Section 215, lays down that an order of discharge cannot be passed until the evidence of the witnesses named for the prosecution has been taken; but the Joint-Magistrate only heard, as I have before stated, three out of the five sent up; and yet, in his judgment, he says that the evidence before him would not justify the conviction of the defendants. This being so, I think the Joint-Magistrate was not justified in dismissing a serious charge like this on the ground that the evidence, only a portion of which he had heard, was insufficient.

2ndly.—The Joint-Magistrate writes: "The complainant's mother must, if there be any truth in the story, have seen the assault. In fact, she must have seen the one witness who saw all that happened. She has not been produced, perhaps because the first information to the police bears a very different aspect from the case as now presented." Holding this opinion, the Joint-Magistrate was, I consider, bound, under Section 351, to have summoned her. I think the inquiry has been much too summary. It is in the highest degree improbable that a mere fall upon some bricks would, as the Joint-Magistrate says the defendant stated, have caused injuries to the plaintiff sufficient to keep him in hospital for sixteen days; and even supposing that the wounds on his face had been caused by a fall, it is not likely that the one on the top of his head could have been so caused also.

There is, moreover, about the plaintiff's statement an absence of anything like exaggeration, which, I must say, strongly impresses me with its truth. The Court will observe that he does not accuse all his assailants with striking him; but admits that though he received blows after he had become partially insensible, he does not know who struck him. These are, however, questions of fact into which I need not more fully enter. I only allude to them as the cause of my believing that the case is a true one, and that the inquiry has not been such as the seriousness of the offence called for.

I therefore submit the case for the orders of the High Court, with the recommendations that the Joint-Magistrate's order be quashed and that he be directed to complete the inquiry in the manner required by law.

Judgment of the High Court.

Jackson, J.—We agree with the Magistrate. The proceedings of the Joint-Magistrate are quashed, and he will proceed to complete the enquiry as pointed out by the Magistrate.

The 9th October 1873.

Present :

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

*Breach of the Peace—Bond—Security—
Evidence—Act X of 1872 s. 497.*

Reference to the High Court under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Backergunge.

The Queen

versus

W. Harvey and others.

In a case of dispute regarding land between A and B (the latter a resident of another district), a Deputy Magistrate, on the report of the police that there were serious apprehensions of a breach of the peace, summoned not only A and the servants of B, but also B; and without taking any evidence against B, found him guilty with the rest, under Section 497, Code of Criminal Procedure, and directed him to enter into a bond and to find security to keep the peace.

Held, that the order as regards B was illegal: it was accordingly set aside.

Reference.—A DISPUTE exists concerning a piece of land situated in the station of Dowlutkhan, between one Nundkishore Chuckerbutty, a mooktear at that station, on one side, and Mr. W. Harvey, of Dacca, on the other. Owing to certain quarrels which took place between Nundkishore's party and the servants of Mr. Harvey in connection with the dispute, complaints were made before the Deputy Magistrate of Duhkin Shabazpur; and the police deputed to enquire into the matter, having reported that there was serious apprehension of a breach of the peace being committed by both parties, the Deputy Magistrate not only summoned Mr. Harvey's servants and the other party concerned, but also Mr. Harvey himself, who is living at Dacca; and finding him with the rest, as he describes it erroneously, guilty of an offence under Section 497, Criminal

Procedure Code, directed him to enter into a bond for Rs. 2,000, with a surety for Rs. 1,000, to keep the peace for a period of one year. The others actually concerned in the quarrel and anticipated breach of the peace have been required to enter into bonds in different amounts.

The particulars in which I consider that the Deputy Magistrate's proceedings have been illegal as regards Mr. Harvey, are stated in my order on the petition which is submitted with the record.

Order of the Sessions Judge on the petition of Mr. Harvey and others.

It appears to me that the Deputy Magistrate's order as respects Mr. Harvey only, of these petitioners, was illegal and should be set aside. As regards the others, who are in Mr. Harvey's service, the Deputy Magistrate had information that they were likely to commit a breach of the peace in a certain event, which justified the issue of a summons under Section 491, Criminal Procedure Code; and there certainly was evidence given before the Deputy Magistrate which he might legally accept as proving the truth of the information he had received. But he had no information under Section 491 that Mr. Harvey (who resides at Dacca) was likely to commit a breach of the peace, or to do any act likely to cause a breach of the peace: and there was afterwards no evidence brought forward shewing that Mr. Harvey was likely to do any such act. The evidence of Bharut Chunder Sen, on which the Deputy Magistrate relies, is no evidence against Mr. Harvey, and he is mistaken in applying Section 30 of the Evidence Act to what this witness says was stated by Doorga Churn. Even if that statement were evidence, it would not connect Mr. Harvey with any intention to commit a breach of the peace.

The case will therefore be submitted to the High Court under Section 296 of the Criminal Procedure Code, with the recommendation that the order requiring Mr. Harvey to enter into recognizance and to find security to keep the peace be set aside.

It is to be regretted that the Deputy Magistrate should have wasted so much time in recording such a mass of evidence, a great portion of which was utterly irrelevant, and in writing so long and also irrelevant a decision.

Judgment of the High Court.

Macpherson, J.—Agreeing with the Judge (Mr. Tottenham), we think that the order as regards Mr. Harvey ought to be set aside. It is accordingly set aside.

The 22nd October 1873.

Present :

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Evidence—Absent Witness—Cross-Examination
—Act I of 1872 s. 33.

The Queen

versus -

Mowjan alias Nane Khan, *Appellant.*

Committed by the Extra Assistant Commissioner of Maunbhoom, and tried by the Judicial Commissioner of Chota Nagpore, on a charge of committing robbery with hurt.

When the evidence of an absent witness is admitted under Section 33 of the Evidence Act I of 1872, the ground for its admission should be stated fully and clearly, to enable the High Court to judge of the propriety of its admission. In the present case, the High Court considered that the evidence of an absent witness had been improperly admitted, because there was nothing to show that by ordinary care and the use of ordinary means the witness could not have been produced.

In order to make a deposition admissible under the Section 33, there must be evidence that the accused person did, in fact, have an opportunity of cross-examining.

Macpherson, J.—It is quite clear that, independently of the evidence of Ratoo Ray, the complainant, there was not (to use the words of Section 167 of the Evidence Act) "sufficient evidence to justify the decision." There can be no doubt that, in the absence of the evidence of Ratoo Ray, the prisoner must have been acquitted.

It becomes necessary, then, for us to decide whether or not the evidence of Ratoo Ray, which consists of the Extra Assistant Commissioner's record of the statements made by that person when examined before him prior to the commitment of the prisoner, was improperly admitted by the Sessions Judge under Section 33 of the Evidence Act. That Section makes such evidence admissible, "without calling the witness himself, if "the witness is dead, or "cannot be found, or is incapable of giving "evidence, or is kept out of the way by the "adverse party, or, if his presence cannot "be obtained without an amount of delay or "expense which, under the circumstances of "the case, the Court considers unreasonable," provided (amongst other things) "the prisoner, in the first proceeding, had the opportunity to cross-examine."

In this case it is not alleged that the witness Ratoo Ray is dead, or incapable of giving his evidence, or that he is kept out of

the way by the prisoner. The ground on which the Judicial Commissioner, in the absence of the witness, admits the depositions given by him before the Extra Assistant Commissioner, is that the witness cannot now be found. The Judicial Commissioner merely says that the witness is a resident of Zillah Monghyr and all attempts to find him have failed; and that "as the case has been pending a long time, and the next Sessions "will not be held till November next * *, "this is a case in which, in justice to the "other witnesses who are in attendance," the trial ought to proceed and the deposition ought to be admitted under Section 33.

The examination of witnesses before the Extra Assistant Commissioner, and the commitment, took place on the 4th of April; and the trial before the Judicial Commissioner was on the 11th of July.

Section 33 of the Evidence Act gives the Courts new powers, which require to be exercised with great caution. There is no doubt that it is still necessary (just as much as ever it was) to produce every witness at the trial, unless it is proved to be either actually impossible to produce him, or to be so difficult to do so that it is, under the circumstances, unreasonable to insist on his production. In the present case, everything turns on the evidence of the absent witness; and without it, the prosecution must fail. It is therefore a case in which the provisions of Section 33 ought to be most strictly applied. The Judge gives us no means of judging whether there was any really good reason why the witness was not produced for the prosecution. He simply says "all attempts to find him having failed." The record shews that a summons was issued, dated the 10th of May 1873, to Ratoo Ray, inhabitant of Dakhin Bohol, within the jurisdiction of Deogurh, Zillah Beerbhoom. From the return to this summons furnished by the Ghatwal of Dakhin Bohol, it appears that Ratoo Ray had left the place and gone to his home in Mouzah Chakai, Zillah Monghyr. A second summons was then prepared containing a direction that Ratoo Ray should appear in the Sessions Court at Purulia, Zillah Maunbhoom, on the 9th July; and an order was recorded on the back of it that it should be sent to Mouzah Chakai. This order bears date the 9th June. But here the vernacular record ends, and there is nothing to shew that the summons was ever issued; while no reason is shewn for its not being so.

We are of opinion that, when the evidence

of an absent witness is admitted under Section 33, the grounds for its admission should be stated fully and clearly so as to enable this Court to judge of the propriety of its admission. In the present case, we think it was improperly admitted: because there is nothing to shew that, by ordinary care, and the use of the ordinary means, the witness could not have been produced.

We observe, further, that there is nothing on the face of the Extra Assistant Commissioner's record to shew that an opportunity was presented to the prisoner of cross-examining the witness Rattoo Ray. It may be gathered from the context that the prisoner was present during the examination of this witness. But it is not stated by the Extra Assistant Commissioner that the prisoner had an opportunity of cross-examining and declined to avail himself of it. We think that, in order to make a deposition admissible under Section 33, there must be evidence that the accused person did, in fact, have an opportunity of cross-examining.

We therefore set aside the conviction of the Judicial Commissioner. We have less hesitation in doing so, as the deposition of the complainant himself before the Extra Assistant Commissioner is not consistent or clear: while the identification of a few rags of old cloth found sewn up in a quilt, which complainant says formed part of an old dhootie which the prisoner snatched from him, cannot be regarded as satisfactory. We direct that the prisoner be acquitted and discharged.

The 22nd October 1873.

Present :

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges*.

Separate Offences—Charge—Punishment—Act X of 1872 s. 317.

The Queen

versus

Sobrai Gowallah and others, *Appellants*.

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge of habitually dealing in stolen property.

In a case of several offences under one Section of the Penal Code, the proper way is to try the accused (under separate charges) for each of the several distinct offences under the Section, which have been clearly proved against them. On conviction of each of these separate charges, a separate sentence on each conviction should be passed, with a direction (under Section 317 of the Code of Criminal Procedure) that each should take effect on the expiry of the next prior sentence.

Macpherson, J.—It may be doubted whether these prisoners have been, in strictness, properly convicted under Section 413 of the Penal Code (of habitually receiving and dealing with stolen property, &c.). Probably the offence really proved is that falling under Section 215 (taking a gratification for helping to recover stolen property). But it does not appear to us to be necessary to interfere: because the prisoners have in fact sustained no injury by the course which the Sessions Judge has taken, inasmuch as, if the case had been properly placed before the Court, the prisoners could have been punished, and ought to have been punished, as severely as they are by the sentence which has been passed on them.

The true way of dealing with these prisoners was to try them (under separate charges) for each of the seven distinct offences under Section 215, which have been clearly proved against them. Having been convicted on each of these separate seven charges, they should have got a separate sentence on each conviction, with a direction (under Section 317 of the Criminal Procedure Code) that each should take effect on the expiry of the next prior sentence. In this manner they might properly have been sentenced to a period of imprisonment longer in the whole than that to which they have now been sentenced. That they well merit 7 years' imprisonment cannot be doubted. Therefore we reject this appeal.

The 24th October 1873.

Present :

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges*.

High Court—Jury—Reference—Insanity—Act X of 1872 ss. 257 & 263—Act XLV of 1860 s. 84.

Reference to the High Court under Section 263 of the Code of Criminal Procedure by the Officiating Sessions Judge of Hooghly.

The Queen

versus

Nobin Chunder Banerjee.

Baboo Juggadamund Mookerjee for the Prosecution.

Mr. W. C. Bonnerjee for the Prisoner.

In dealing with a reference made by a Sessions Judge under Section 263, Code of Criminal Procedure, in consequence of his disagreeing from the verdict of the Jury, the High Court must deal with it as an appeal by

the prosecution, and has authority to convict the accused person on the facts and to pass sentence accordingly, —Section 257 of the Code, by which the Court has to decide which view of the facts is correct, being read as qualified by Section 263.

The fact of unsoundness of mind is one which must be clearly and distinctly proved, before any Jury is justified in returning a verdict under Section 84 of the Penal Code.

Macpherson, J.—THE JURY in this case have found that the prisoner caused the death of his wife, but that he is not guilty of murder, because when he killed her he, by reason of unsoundness of mind, was incapable of knowing that he was doing an act which was wrong or contrary to law. The Sessions Judge, disagreeing with the verdict of the Jury as regards the unsoundness of the prisoner's mind, was of opinion that he ought to have been convicted of murder, and he has (under Section 263 of the Criminal Procedure Code) submitted the case to the High Court, considering it necessary for the ends of justice to do so. It thus becomes necessary for us to deal with the case submitted to us as with an appeal, which we read as meaning an appeal by the prosecution: and by the provisions of Section 263, we have authority to convict the accused person on the facts, and to pass sentence accordingly.

In the "grounds" recorded by the Judge, as required by Section 464, he says that in his opinion the verdict is opposed to the evidence on the record; that the accused was not of unsound mind; and that he committed the offence of murder.

There is really but one question before us, —that as to the state of the prisoner's mind at the time he caused his wife's death. That he did cause her death cannot be seriously doubted. The Jury have found as a fact that he did, and the Sessions Judge agrees with them as to this. And that this finding is correct is, we think, conclusively shewn by the evidence.

The learned counsel for the prisoner has contended that as, under Section 257 of the Criminal Procedure Code, it is the duty of the Jury (as distinguished from the duty of the Judge) to decide which view of the facts is true, this Court cannot disturb, or at any rate ought not to disturb, the verdict of the Jury, if there is on the record any evidence whatever in support of it. But Section 257 must be read as qualified by Section 263, the effect of which is that, if the Judge disagrees with the Jury and submits the case to the High Court, the whole matter is opened up,—the High Court must treat the case as before it on appeal, may

convict the accused person on the facts, and if it does convict him, shall pass the proper sentence upon him. We quite agree, however, that the powers given to this Court, by Section 263 are not to be lightly exercised, and that the unanimous verdict of a Jury ought not to be set aside, even if the Sessions Judge disagrees with it, unless that verdict is clearly and patently wrong and unsustainable on the evidence. If there were any substantial doubt in this case, we should certainly not disturb the verdict. It appears to us, however, that there can be no reasonable doubt about the matter.

Without saying that there is on the record absolutely nothing which could be said to afford some evidence of unsoundness of mind, we have no hesitation in saying that there is scarcely any such evidence, and that such as it is, it is wholly unreliable and worthless for the particular purpose of proving insanity. Witnesses speak of the intensity of the prisoner's rage and grief when he heard of his wife's alleged infidelity a day or two before the murder, of his rolling on the ground in his passion, of his eyes being red or blood-shot, and of his skin being hot. They also tell how, when he had struck down his wife, he came out of the house, calling aloud that he had killed her, and voluntarily giving himself up to a chowkeedar that he might be dealt with according to law for what he had done. These points are relied on as shewing insanity. It may be that if there had been substantial evidence of the prisoner's unsoundness of mind, these facts, or some of them, might have been deemed to be corroborative of it. But in themselves these facts, whether taken singly or together, are no real evidence of unsoundness of mind, for there is not one of them which might not in the natural course of events have been found to exist in the case of a man who was perfectly sane, but was laboring under the influence of great grief and passion.

It is not because a man commits a very horrible murder, or because he commits it while laboring under strong passions and feelings, that therefore the world is to assume that he must have been insane when he committed the deed. The fact of unsoundness of mind is one which must be clearly and distinctly proved, before any Jury is justified in returning a verdict under Section 84 of the Penal Code. Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved.

Here it is not attempted to be proved that,

prior to this occurrence, the prisoner ever at any time showed any symptoms of insanity. It is not even suggested that the prisoner was of unsound mind until he heard the reports which caused him two days afterwards to take his wife's life. Nor is it alleged that he was of unsound mind subsequently, at the time he was tried, or at any other time. And not a single medical witness, nor even the Jailor who has had him in custody since the murder (which took place in the end of May), has been called to speak as to the prisoner's mind being unsound. The case proved is simply that the prisoner, who was employed in a Government Printing Press in Calcutta, and up to that time was of sound mind, went from Calcutta on the 24th of May to visit his wife, who was living in her father's house; that almost immediately after reaching his father-in-law's house, he became aware of certain rumours as to his wife's infidelity; that he (and apparently not without cause) believed these rumours to be true, and considered that her father was very much to blame in the matter; that he was passionately angry and greatly grieved at what he heard, and removed his wife from her father's house to that of an aunt (*didima*), who lived close by; that he resolved to bring his wife away with him back to Calcutta, but was afraid (and very likely with good reason) that he would be prevented from doing so by those who had led his wife astray; that he took his wife back to her father's house on the 27th, saying that on the next day he would take her to Calcutta; that the same evening, seizing the opportunity of his being in the house alone with his wife, he murdered her; and that, having murdered her, he ran out of the house crying aloud that he had done so, and went and delivered himself up to a chowkeedar, saying he had killed his wife and he might deal with him as the law directed.

The prisoner has confessed the whole matter at length before the Deputy Magistrate, and subsequently before the Magistrate. And the statements made by him are borne out in all substantial respects by the evidence of the witnesses who have been examined. It is clear that the murder was committed owing to the unhappy position in which the prisoner considered his wife and himself to be placed. He did the deed under the influence of anger, jealousy, and grief. No doubt any person placed in the position in which he was, or believed himself to be placed, is much to be commiserated. But there is absolutely nothing on the facts before

us from which any reasonable person can conclude that the prisoner was "incapable of knowing the nature of the act," or that he was incapable of knowing that he was doing what was wrong or contrary to law. On the contrary, all the evidence shows that he knew the nature of the act perfectly well, and knew that it was wrong and that it was contrary to law.

On the whole, we think the verdict of the Jury so utterly wrong, and so entirely against the evidence, that we consider that the Judge acted rightly in submitting the case under Section 263; and that it is our duty to convict the prisoner on the facts.

We find that the prisoner has committed culpable homicide amounting to murder; and we sentence him (under Section 302 of the Penal Code) to transportation for life.

The 24th October 1872.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, Judges.

Whipping—Act X of 1872 ss. 305, 310.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Officiating Magistrate of Chittagong.

Hur Chundra Kulal

versus

Jafer Ali.

In passing a sentence of whipping in addition to six months' imprisonment, a Deputy Magistrate ordered that the prisoner should be brought before him at the termination of the imprisonment, and that the sentence of whipping should then be carried out.

On the recommendation of the Sessions Judge (who referred to Sections 305 and 310 Act X of 1872), the High Court cancelled the sentence of whipping as having become inoperative and incapable of being carried out.

Reference.—THE prisoner was convicted on April 4th, 1873, of an offence under Section 411, Penal Code, and it was in evidence that he had been previously convicted of an offence under the same Section. Upon this, the Deputy Magistrate who tried the case sentenced him to six months' rigorous imprisonment and a whipping of 25 stripes. The Deputy Magistrate ordered with regard to the whipping that the prisoner should be brought before him at the termination of his imprisonment, and that the sentence of whipping should be then carried out. The prisoner was duly released from jail on the 3rd October, but

I submit that the sentence of whipping is bad and should not be carried out. First, because by Section 310 of Act X of 1872 the whipping must be inflicted immediately on the expiry of 15 days from the date of the sentence; or, in case of an appeal, immediately on receipt of the order of the Appellate Court confirming the sentence. The sentence was confirmed on the 23rd April; but when the order was received at the jail it does not appear.

Secondly, because Section 305 of Act X of 1872 directs that the sentence be executed by the officer in charge of the jail.

In a somewhat similar case to this, it was held in Madras that the sentence was inoperative by lapse of time, and it was cancelled:—6 Madras XXXVIII., App. Pro., November 13th, 1871.

The prisoner has been released upon his own recognizances in the sum of Rs. 50, and ordered to come up when called upon. The sentence of whipping has not been carried out.

Judgment of the High Court.

Macpherson, J.—Under the circumstances, the sentence of whipping has become inoperative and cannot be carried out now. It is therefore cancelled.

The 28th October 1873.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges*.

High Court—Reference—Jury—Act X of 1872, s. 263.

Reference to the High Court under Section 263 of the Code of Criminal Procedure by the Officiating Sessions Judge of Hooghly.

The Queen

versus

Sham Bagdee and others.

The High Court will exercise the powers vested in it by s. 263 only in cases in which it finds the verdict of the Jury clearly and undoubtedly wrong.

Macpherson, J.—THE evidence against the prisoners, in whose interest the Judge has referred this case to the High Court under Section 263, is certainly not very strong, inasmuch as it consists solely of the statement of the prosecutrix. Nevertheless the evidence is quite sufficient, if believed. The Jury did

believe it; and how can we say that they were wrong in doing so? It is as likely as not that they were right. And is the High Court to set aside a verdict in such a case?

I think we ought not to interfere with a verdict, unless we can say decidedly that we think that it is clearly wrong. If we are to interfere in every case of doubt, in every case in which it may with propriety be said that the evidence would have warranted a different verdict, then we must hold that real trial by Jury is absolutely at an end, and that the verdict of a Jury is of no more weight than the opinion of assessors. I presume that if this were the intention of the Legislature, it would have said so. But the Legislature has not said so.

As it is, I consider that the Court should exercise the powers vested in it by Section 263 only in cases in which it finds the verdict of the Jury clearly and undoubtedly wrong. This is not such a case; although I may admit that there may be room for doubts being entertained as to the facts.

Therefore I think the verdict of the Jury should remain undisturbed, so far as this Court is concerned: and that the Sessions Judge must pass sentence on the prisoners.

Morris, J.—I concur.

The 3rd November 1873.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges*.

High Court—Jury—Reference—Act X of 1873 s. 263.

Reference to the High Court under Section 263 of the Code of Criminal Procedure by the Officiating Sessions Judge of Dacca.

The Queen

versus

Udya Changa and others, *Prisoners*.

In a case in which the accused were charged with murder (s. 302), culpable homicide not amounting to murder (s. 304), and voluntarily causing grievous hurt (s. 325), the Sessions Judge at the trial added a further charge of house-breaking by night in order to the commission of an offence (s. 457). The Jury unanimously acquitted the prisoners of the three original charges, and a majority of the Jury (four out of five) acquitted them also of the last charge. The Sessions Judge agreed with the verdict of the Jury as regards the three original charges, and recorded a formal order acquitting and discharging the prisoners on these three charges. He differed from the majority as to the fourth charge, and

referred the case to the High Court under s. 263 of the Code of Criminal Procedure:

Held, that where (as in this case) the Sessions Judge has approved of a verdict on certain charges, and finally acquitted and discharged the accused as to these charges, the High Court cannot under s. 263 convict on the facts on these very charges. That Section seems to contemplate only a case in which, without recording any order of acquittal or conviction, the Sessions Judge refers the whole case.

As there was nothing in this case to show on what grounds the majority of the Jury acquitted the prisoners on the additional charge, and as the Sessions Judge agreed with the unanimous verdict as to the three original charges, the High Court presumed that the reason which weighed with the majority of the Jury in finding the prisoners not guilty on the additional charge must have weighed with the whole Jury in finding them not guilty on all the three other charges, and accordingly the Court could not set aside the verdict of the majority on the last count without practically finding directly in the teeth of the verdict of the unanimous Jury on the first three counts.

Macpherson, J.—THIS case has many most remarkable features.

The four prisoners were committed for trial, charged, 1st, with the murder of Nakari Dass under Section 302 of the Penal Code; 2nd, with culpable homicide not amounting to murder under Section 304; and 3rd, with voluntarily causing grievous hurt under Section 325. At the trial the Sessions Judge added a further charge of house-breaking by night in order to the commission of an offence under Section 457.

The case for the prosecution was simple enough; that Nakari Dass was on a certain night sleeping in the house of a woman whom he kept, and with whom one or more of the prisoners also had, or recently had had, intrigues; that in the middle of the night the four prisoners broke into the house where Nakari Dass was, and dragged him out of it, first binding the woman who was with him, and shutting her into the house; that certain persons during the night saw the prisoners beating some one not far from the house from which Nakari was taken; and that next morning at daybreak Nakari was found lying dead under a tamarind tree, also not far from the house, with ten of his ribs broken.

On the evidence, *prima facie*, the case made for the prosecution was well proved. Dr. Wise, the Civil Surgeon of Dacca, who made the *post-mortem* examination of the body of the deceased, says it was the body of a healthy man. Then, after stating that he found ten ribs were broken, he says:—"I attribute his death to the shock of these injuries. I consider that these injuries were probably caused by squeezing or rolling between bamboos. Simple blows

"could not cause these injuries. These injuries could not have followed any accident."

Supposing the Jury to have believed the statements of the witnesses, there was ample proof that the prisoners were guilty of the offence of murder. And unless the Jury disbelieved the story that the deceased was carried off by these four prisoners from the house that night, and found dead next morning with ten ribs broken, it was their clear duty to have found a verdict either of murder or of culpable homicide not amounting to murder; and they ought to have been so directed by the Judge.

In this state of things, we find that the Sessions Judge, after going through the evidence, charged the Jury to the following effect:—"As regards the charge of murder, 'I do not know why it was added, unless it was to adorn the calendar. There is not the smallest evidence to show that the prisoners ever intended to kill the deceased. You might, however, if you feel satisfied that the prisoner beat the deceased, and that the death was the result of that beating, convict the prisoners under Section 304. If, however, you think that there is reliable evidence to show that the prisoners beat the deceased, yet, considering the Doctor's evidence, you do not feel convinced that the beating which the witnesses speak to was the cause of the injuries described, you ought to convict the prisoners of hurt, but only I think of simple hurt; for, there is nothing in that case to show that the results which raise the offence to grievous hurt were caused by beating. And lastly, if you are satisfied that the prisoners broke into (the woman) Gunga's house on the night of Saturday, with intent to beat her and her paramour, you can, in addition to either of the above charges, convict the prisoners under Section 457.'"

Upon this, the Jury found the prisoners not guilty on the three original charges; and the Judge concurring with that verdict, the prisoners have been acquitted and discharged (as to them). As to the fourth charge (that of house-breaking, added by the Judge himself), a majority of four out of the five jurors found the prisoners not guilty. The fifth Juror gave a verdict of guilty on this charge; and the Judge, agreeing with the one Juror, and disagreeing with the majority, has referred the case to the High Court under Section 263 of the Criminal Procedure Code.

In making the reference, the Judge, after saying he has great doubts as to the veracity of the witnesses who depose to having seen a man beaten in the dark near the woman's house, says:—"But on the other hand I feel not the slightest doubt that the woman Gunga has told substantially the truth, and the prisoners really broke into her house and carried off the deceased, who, I have little moral doubt, was afterwards severely beaten by them, though, whether with an intention to cause his death is, I think, questionable. Considering that the prisoners were all persons with whom the woman Gunga was well acquainted, and considering they all spoke, I see no reason to doubt that she really recognized them. She may perhaps have embellished her story. I doubt myself whether she was ever bound: probably, fear for herself, or indifference to the fate of her lover, kept her from following the house-breakers."

As the deceased was stated by several witnesses to have been found at daylight dead under the tamarind tree with (as it afterwards turned out) ten ribs broken, it does seem very remarkable that the Sessions Judge, who himself believed that Gunga had substantially told the truth, and that the prisoners did break into her house and did carry off Nakari Dass, and did afterwards severely beat him, should have charged the Jury, as he did, that there was no evidence of murder, and that a verdict of simple hurt might be a proper verdict. A more misleading charge cannot well be imagined.

However, the case has been referred to this Court under Section 263.

But here another difficulty arises from the course which the Sessions Judge has thought fit to adopt. Agreeing with the verdict of the Jury on the first three charges, he has recorded a formal order acquitting and discharging the prisoners. He thus practically confines his reference under Section 263 to the charge of house-breaking. Under Section 263, the case being once before the High Court, the Court may convict the accused person on the facts, and may pass such sentence as might have been passed by the Court of Session. But this Section does not appear to me to contemplate such a thing as that, when the Sessions Judge has approved of a verdict on certain charges and formally acquitted and discharged the accused as to these charges, the High Court should on the facts convict on those very charges. It seems to contemplate only a case in which, without recording any order of acquittal or

conviction, the Sessions Judge refers the whole case. Even supposing, however, that this Court, in strictness, has power to interfere as regards the charges on which the accused has been acquitted by both Jury and Judge, I should decline to exercise such a power in the face of an unanimous verdict of a Jury, concurred in by the Sessions Judge, whether that verdict appeared to me to be wrong or not.

How then ought this case to be dealt with, bearing in mind that the accused have been acquitted by the Judge and the Jury unanimously, on the three principal charges? The reason which weighed with the majority in finding the prisoners not guilty under Section 457, was the same as must have weighed with the whole Jury in finding them not guilty on all the other charges. For the only possible ground on which the Jury could escape convicting on one or other of the first three counts, was that they believed the whole case to be false and got-up, and that they did not believe that the prisoners ever broke into the house, or ever carried off Nakari Dass, or ever beat him. And that is the only possible ground also on which they could escape convicting on the count for house-breaking. If the Jury were right as regards the first three counts, they are equally right as regards the last count. The Judge has approved of the verdict on the first three counts; and to be consistent, he ought to have agreed with the majority as to the last.

It is true that the Judge never in his summing up suggested to the Jury that the whole case was false, or that the breaking of the ribs was a mere contrivance in order to make evidence against innocent persons. It is true also that the Judge never took the trouble to ascertain on what ground it was that the Jury arrived at the verdict which they gave, and that there is nothing before us to show positively what these grounds were. But we must presume (especially as the Judge approves of what they did) that the Jury did not act without reasonable grounds: and, so presuming, it is evident enough what the grounds must have been. The result is that we cannot now set aside the verdict of the majority on the last count without practically finding directly in the teeth of the verdict of the unanimous Jury on the first three counts.

It is not possible for us to say that as a matter of fact the Jury were wrong if they disbelieved the witnesses. The verdict of the majority must stand: and the

prisoners must be acquitted on the fourth as on the other charges. That they are so acquitted is due to their having already been acquitted by, and with the approval of, the Sessions Judge on the first three charges.

The 18th November 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Procedure—Judge—Witness.

(Miscellaneous Case.)

Hurro Chunder Paul and others, *Petitioners.*

Mr. C. Piffard and Baboo Kishen Doyal
Roy for the Petitioners.

In a case in which a Deputy Magistrate took an active part in the capture of parties charged with having been members of an unlawful assembly—parties whom he himself tried on that charge—it was held that he was bound to state to the accused, so far as he could, what were the facts he himself observed and to which he himself could bear testimony: and the prisoner in such situation had a right, if he thought it desirable, to cross-examine the Judge, whose evidence should be recorded and form part of the record in the case. The proper course, however, for the Deputy Magistrate to have taken in this case would have been to decline to try the case, and to ask that it should be undertaken by some other Judge.

Phear, J.—IN this case the Deputy Magistrate may possibly have performed the functions of a Police officer well. Certainly, the narrative of his proceedings, which he has given us under the form of a judgment, although it may perhaps be said to be somewhat weakened in consequence of certain conditions which the Deputy Magistrate thought proper to impose upon himself in the telling of it, is most graphic; and moreover is not wanting in passages of humorous pleasantry which make it exceedingly light reading. But unquestionably it cannot be considered as a judgment in the proper sense of the word.

Indeed, the Deputy Magistrate seems to have betrayed, at the outset of this judgment, a sense of his being at the moment somewhat in a false position. He says that "in deciding this case I labor under the same difficulty that I did last year in the case of the murder of Jubar Khan, in which Dwarka Nath Rai and Jahanabi Chowdhurani were the parties interested. In this, as in that case, I was the chief actor and investigator. I have in this, as in that, to separate and so far as in me lies to banish from the record, and if it were possible, from my own recollection, facts which I have seen and known,

and confine myself strictly to the evidence in the record. In fact, I have to do that most difficult of all things,—to, as it were, change my identity, and speak, write, and think, not in the first, but third person."

What was the particular obligation under which the Deputy Magistrate supposed himself to have labored, and which constrained him to "change," as he says, "his identity," it is perhaps difficult to understand. It has been held by this Court, and is accordant with the general principles which govern the conduct of an English Court of criminal justice, that while a person is not necessarily disqualified from presiding as a Judge or acting as a Juryman upon an inquiry into or investigation of facts, because he may have been himself a witness of some of the facts which are the subject of the inquiry or investigation, if he does do so, he, so far from being under any such obligation as that which the Deputy Magistrate seems to have referred to, is bound to state to the prisoner or other person concerned, or to make known to him, so far as he can, what are the facts which he himself observed, to which he himself can bear testimony. And, moreover, the prisoner, who is being tried by a Judge in this situation, has a right, if he thinks it desirable, to cross-examine the Judge who, under these circumstances, and to this extent, must be viewed as a witness, and his evidence should be recorded. It is quite erroneous, in our opinion, to suppose on the contrary, as the Deputy Magistrate appears to have supposed, that he was bound to keep out of sight altogether the part which he had played in the matter, and to pretend (we cannot use any other word than that) to pretend that he knew nothing about the facts excepting so much as the witnesses told him in Court. It is always dangerous for any man in whose right conduct others are concerned to set up and endeavour to carry out a fiction such as this. It is most specially dangerous for a Judge, who is under the grave responsibility which attaches to the office of a criminal Judge, to attempt anything of the kind. The Deputy Magistrate, if he thought it right, as he did, to take upon himself the duty of trying the prisoners in this case, ought to have made no pretence whatever of any sort; he ought to have frankly avowed and openly stated in his Court all the part which he had taken, and the facts which he had observed, and made his own evidence part of the record in the case. The awkwardness of a criminal Judge being the principal witness in the case which he has to try, is no doubt

most apparent; this, however, is reason for his declining to try the case, not for his endeavouring to assume an unreal character. Although it appears that the Deputy Magistrate did not very clearly realize to himself what was the true nature of the obligation which he was under in the position which he had taken up, or rather I should say entirely misapprehended it, yet I think perhaps we shall not be wrong in attributing to him a proper feeling, that the situation he was placed in was not altogether a right one; that it was not altogether fair that he should be the person to try the persons whom he had done so much to "capture," as he says, in open fight. At any rate that if he did do so, he must take unusual precautions to discard what every body would probably be inclined to think ground of prejudice and bias, and to relieve himself, as far as he could, of influences which made him thus distrust himself. If this were so, then it seems to us that the Deputy Magistrate ought also to have felt that the proper course for him to have taken was to decline to try this case, and to ask that it should be undertaken by some other Judge.

When we come to the evidence which has been recorded, and to which we have given our best attention, we fail altogether to find therein any evidence of the prisoners having been collected together when arrested as members of an unlawful assembly, which had a definite common purpose of an unlawful kind. Both the Courts which have tried this case have arrived at the conclusion that the prisoners, when arrested, actually formed with others an assembly of men which had for its common purpose the object of attacking a certain opposite faction with whom these men were at feud. But there appears to us to be really no evidence to this effect at all. The main features of the occurrence, so far as we can gather them from the witnesses, or from the narrative of the Deputy Magistrate, are that the Deputy Magistrate himself, with some servants or followers, designedly disguised as *latteals*, suddenly, in the very early hours of the morning, entered a village, and raised the ordinary *latteal* cry,—that is, as we understand, the cry usually raised by *latteals* in that part of Bengal when they commence or are making a hostile attack upon an opposing party of *latteals*, or upon what may be termed an enemy's village. Up to the moment when this was done, nothing in the shape of an assembly of men had been discovered, but two or three villagers had been seen in the dim light, apparently, as the

Deputy Magistrate thought, making off into the *jhao* jungle or into the paddy fields on the approach of his party, and some of the Deputy Magistrate's own servants, dressed as *latteals*, had been sent to seize them. Naturally they were resisted in this. The alarm thus occasioned, and the cry of *Ali, Ali*, seem to have been almost simultaneous; and thereupon a good many of the inhabitants of the invaded village (the witnesses estimate them at some 20 or 30 in all) came out. The Deputy Magistrate, sword in hand, at once attacked them with great vigour, and they fled in all directions as fast as they could; but the Deputy Magistrate succeeded in making the accused persons prisoners. And it is the fact that very little delay occurred, as the Deputy Magistrate thought, before the village showed itself aroused and prepared to resist this feigned attack. It is this fact alone which both the Courts below have considered sufficient to establish the conclusion that these men must have already unlawfully assembled together with the purpose of attacking the other party who, they were thus caused to believe, had stolen a march upon them, and taken the initiative by attacking them first. No doubt, this conclusion may *possibly* be a true one; but it seems to us that the evidence on the record of the occurrence which had just been referred to is of itself quite insufficient to legally justify the Court in adopting it judicially. A Court of criminal justice is bound to look fairly at all the established facts of the case, and to give the prisoners the benefit of any reasonable hypothesis arising out of and suggested by these facts which may serve to explain their conduct. On the state of things represented by the Deputy Magistrate himself, it appears to us by no means an unreasonable hypothesis that the prisoners and their companions, whether or not they were at the time already assembled for any specific purpose, did really, when the Deputy Magistrate suddenly came upon them, at most rush forward to meet and resist an unprovoked attack, which they had reason to suppose was being made against themselves. The evidence is absolutely insufficient to carry us further than this; and this is a very different thing, totally different, from the unlawful object which the conviction finds them guilty of. We are unable to discover that there is any other evidence of a specific unlawful object than that which has just been mentioned. We further think that there is no evidence on the record of the existence of any assembly at all, other than that such as it was which the Deputy Magistrate's challenge

brought about. The Deputy Magistrate's reasoning on this point does not ride above speculation. Therefore, we are obliged to come to the conclusion that the conviction is bad in law, because there is no evidence on the record sufficient to establish the material fact that the prisoners were assembled together for the purpose of carrying out a specific unlawful object. We consequently think that the conviction must be set aside and the prisoners released.

We would further add the remark that the stratagem which the Deputy Magistrate, in the exercise of his discretion and in the direction of those who were with him, thought it right to practise for the detection of unknown offenders, was one of a most dangerous character. Had the villagers whom he and his party pretended in this way to attack, under the alarm or excitement caused by hearing the cry of *Ali, Ali*, either fired a shot at the Deputy Magistrate's party, or done any other act of violence by which one of the Magistrate's party was killed or seriously injured, the responsibility resting upon the Deputy Magistrate would have been exceedingly great, and indeed would have been of a criminal character.

The conviction is set aside and the prisoners released.

Let also the fine, if paid, be refunded.

The 18th November 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Unlawful Assembly—Act XLV of 1860 s. 141.

(Miscellaneous Case.)

Koylash Chunder Dass and others,
Petitioners.

*Baboos Kalee Mohun Dass and Nullit
Chunder Sein for the Petitioners.*

In this case in which the prisoners were convicted of being members of an unlawful assembly under s. 141 of the Penal Code, the Court held that the evidence was insufficient to warrant a conviction, there being

nothing to show what was the specific unlawful object, within the scope of cls. 3 and 4, of the persons composing the assembly.

Phear, J.—We think that we must in this case pass the same decision as that which we passed in the last (No. 175, *Queen v. Hurro Chunder Paul and others*), substantially for the same reason, namely, that the evidence on the record is not sufficient to establish the conclusion that the prisoners and others were assembled together for a common object falling within any of the definitions of an unlawful object given in Section 141 of the Penal Code. The Deputy Magistrate has summarized the facts which he thinks the evidence makes out, in the following words:—

"On the 19th May 1873, at 7½ to 8 P. M., it appears that the Deputy Magistrate of Atia was informed that a breach of the peace was anticipated between Dwarka Nath Rai and Jahanabi Chowdhurani's adherents on or about or between certain lands or between Narsingpur and Kashi-nagor.

"Without disclosing his intentions, he started at 9½ P. M. for the place, taking with him a number of persons to help him. He roused up haphazard a ryot of Dwarka Nath Rai out of his bed and bari, and directed him to show where the men of Jahanabi Chowdhurani were unlawfully assembled: the man took him to the neighbourhood of the very place, where eight of the adherents of Jahanabi Chowdhurani were arrested. The record does not disclose the motive of the Deputy Magistrate in not taking any guide with him from Tauzail from either side, but it is not difficult to arrive at some probable supposition upon the point; this Court in its judicial capacity is precluded from recording the reasons which influenced the Deputy Magistrate as an executive officer in acting without guides supplied by either party.

"Everything connected with the case and the fact that all the eight defendants (one to eight inclusive) admit their dependency on Jahanabi Chowdhurani, all tend to show, and it is presumption which they must rebut, a presumption founded on legal evidence, that defendants one to eight inclusive were members of an unlawful assembly within the provisions, if not of Clause 3 of Section 141 of the Indian Penal Code, yet certainly within those of Clause 4 of the same Section of the same Code. It is

* See preceding case.

"equally clear that no sufficient evidence to rebut this just and legal presumption has been adduced.

"The only evidence against defendant No. 9 is that of Kal Nath Biswas, Thanna Sub-Inspector. It appears that he was a servant of the bari in which he was arrested. He seems to be a weakly, half-idiotic sort of man. There is a certain doubt in his favor, of which I am willing to give him the benefit."

Now this presumption of which the Deputy Magistrate speaks, seems rather to be an assumption of fact.

Clause 3 of Section 141 of the Indian Penal Code states the unlawful object in these words:—"To commit any mischief or criminal trespass, or other offence." And Clause 4 of the same Section defines the object:—"By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water, or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right."

The Deputy Magistrate appears to think that it is an inference of law from the facts which he has here set out that the prisoners and others were assembled together in the bari with an object which is either one of those defined by the words of Clause 3, or one of those defined by the words of Clause 4.

Now these are very specific objects indeed, and many in number, for several classes of them are mentioned by the 4th Clause; and we are entirely at a loss to understand how the mere fact of more than five persons being collected together, awake at night in one bari, affords a legal presumption that they were so assembled for an object which must necessarily be one out of the large number of objects specified in the 3rd and 4th Clauses of Section 141 of the Penal Code.

The Deputy Magistrate, no doubt, probably for a very good reason, was of opinion that the excuses which the different prisoners gave for their being in or near the bari were not true; and it is a very reasonable inference when a man is lawfully called upon to account for his conduct, and is found to give a false reason for it, it is a very good inference that the true reason for that conduct was of a character such as he did not like to

disclose: that the conduct probably was not dictated by a good motive, or even possibly that it was dictated by a dishonest one. But there is no inference that we are aware of legitimately arising from such a fact going to this extent, namely, that the dishonesty must be of that particular character which is specified in any given Clause of the Penal Code, selected by the Deputy Magistrate as the foundation for the charge against the prisoners.

If we look at the 3rd Clause of Section 141 a little more closely in connection with the assembly in the bari, we find ourselves called upon to enquire what mischief was it the object of these men to commit, or what criminal trespass, or what other offence, and against whom was it to be committed? They seem, according to the account of the witnesses in this case, to have been assembled in the bari of some one situated upon the ground, or within the share of the 6 annas shareholder, whose adherents they were said to be. There is nothing of course unlawful in that. They are not even trespassing upon the land of any one.

Again, if we turn to the 4th Clause, we must see what property it was which these men are to be supposed to have been actuated in their assembling together with the intention to take or to obtain possession of, or what person was it whom they intended to deprive of a right of way, or of the use of water, or of any other incorporeal right. In other words, what was the specific unlawful object, within the scope of these two Clauses, which was the common object of the persons composing the assembly in this bari, when the Deputy Magistrate disturbed them? The Deputy Magistrate has endeavoured to arrive at this object by the aid of a legal presumption, as he terms it, based on the fact that they were assembled, fifteen or twenty together, in one bari, and when questioned they gave severally accounts of their purpose which could not readily be believed to be true. Clearly, as it seems to us, the prosecution has entirely failed in this part of the case. No doubt, more than five persons were assembled together in a bari, somewhere in the middle of the night, and under all the circumstances which happened it might be possibly presumed that the purpose of their assembling there was not altogether a good purpose. One of the prisoners, Koylash Chunder, the supposed leader of them, who was not however one of those in the bari, said, when he was arrested in the neighbour-

hood of the bari, that he himself was on the look-out for an attack upon his village from the adherents of the 5 annas zemindar. This may or may not be a true account; even if it was true, it would not necessarily make either his conduct or the conduct of the other men in the bari, with whom he was supposed to be connected, unlawful. If it was the fact that the people of the 6 annas shareholder were expecting, with or without reason, an attack upon the property of themselves or their zemindar, at the hands of the adherents of the 5 annas shareholder, it would not be unlawful on their part, having previously, as it seems they had, applied to the Police authorities for help, to keep themselves assembled together in the bari of one of their number, waiting ready, so far as they could, to protect themselves and repel the attack. Whether that was so or not, if we exclude Koylash's own statement, we really have no means of judging any more than we have the means of judging whether they were actuated by the purpose of taking offensive action against their opponents. We are altogether without evidence as to the common purpose or object of the men assembled together in the bari, supposing they had any. We therefore are of opinion that this conviction also must be set aside, and the prisoners released. To a certain extent the remarks which we made relative to the position taken up by the Deputy Magistrate in the other case are applicable here. It is unfortunate that he thought it necessary to profess to decide this case as if he were perfectly unaware of any of the facts and had taken no part whatever in the matter, and to make believe that some second person, not himself, was the leader of the Police party. It is almost painful to read the passages of the Deputy Magistrate's judgment, wherein apparently, with a serious endeavour to act out this transparent fiction, he speaks of himself in this way:—"It appears that the Deputy Magistrate of Atia was informed that a breach of the peace was anticipated, &c." And "this Court in its judicial capacity is precluded from recording the reasons which influenced the Deputy Magistrate as an executive officer in acting without guides supplied by either party." Had satire been intended by the writer, which we do not suppose was the case, it could hardly have been more effectively conveyed than in the language of the judgment.

We direct that this conviction be set aside and the prisoners released, and such fines as have been paid must also be refunded.

The 18th November 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris, Judges.

Theft—Possession.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Officiating Session's Judge of Moorshedabad.

Hossenee Sheikh

versus

Rajkrishna Chatterjee.

In a charge for stealing, it must be proved that at the time of the act being done the property stolen was in the possession of the prosecutor.

Phear, J.—In this case the prisoner has been convicted of stealing a certain babul tree belonging to the prosecutor. In order to constitute the offence of stealing, the prisoner must have dishonestly taken out of the possession of the prosecutor, or dishonestly done something towards taking out of the possession of the prosecutor, the article which is the subject of the charge. But in the present case there is no evidence whatever that the tree, which the accused is charged with having cut down and stolen, was at the time of the act being done in the possession of the prosecutor. Indeed, no evidence whatever seems to have been given on the part of the prosecution. It is true that certain documents were filed, but apparently they were not in any way proved.

The case of the accused was that the land upon which the tree stood was his own and in his possession, and that the documents filed by the prosecutor were only papers in certain benamsee transactions.

In this state of things it was certainly incumbent upon the prosecutor to prove that the possession of the tree at the time when it was cut down was in himself. Without this first step, the case of the prosecution could not advance at all. The conviction is clearly wrong: there is no evidence either given on the part of the prosecution, or in the shape of an admission made by the accused, which goes in any way to establish that the accused cut down and took away the tree out of the possession of the prosecutor.

The conviction will therefore be set aside, and the fine refunded if it has been paid.

REVENUE CIRCULARS.

Direction for filling up Return No. IX as to abatement of revenue.

No. 5.

In submitting Return No. IX in future, District Officers are requested to state distinctly in the column of remarks, in each case in which the whole revenue of the estate is recommended for abatement, whether it is proposed to remove the estate altogether from the revenue roll, or to retain it without demand of revenue.

Alteration in Statement No. 20, Board Rules, page 302.

No. 6.

For the words "Former Actual Collections" in column 7 of the first table in Statement No. 20, page 302 of the Board's Rules, read "Former Actual Mofussil Collections."

JUNE 1873.

HON'BLE V. H. SCHALCH.

Nota Bene to Table in Clause 12, Board Rules, page 43.

No. 1.

THE following *N. B.* should be inserted

at the foot of the Table in Clause 12, page 43 of the Board's Rules—

"*N. B.*—The Statement should include stamp fees in pauper "suits."

Additions in the list of returns, at page 262, Board Rules.

No. 2.

In the list of returns at page 262 of the Board's Rules, for No. "14 Irrigation Statistics," among the annual ones to be furnished by all District Officers, substitute "14A. Report on Wards' Estates.* Due 20th May, under Government Circular No. 8 of 6th March 1873."

In the annual returns to be furnished by Commissioners to the Board, after "Commissioners' Administration Report" add "Due 30th May under Government Circular No. 8 of 6th March 1873;" and insert, as the last entry under this heading, "A Report on Wards' Estates. Due 20th June, under Government Circular No. 8 of 6th March 1873."

Erratum in heading of Column 2 of Return No. 24 prescribed by Accountant-General.

No. 3.

THE heading of column 2 of Return No. XXIV, as originally prescribed by the

* See erratum below.

Accountant-General, was "Amount of probable cost of land for each work," but in the edition of the Return now in use, the word "year" has been substituted for "work" in column 2. This has occurred through a typographical error, and should be corrected at once.

Points out how a Ward's net income should be calculated.

No. 4.

In estimating the figures to be entered in column 8 of the Statement prescribed by Circular Order No. 2 for July 1872, and, as a general rule, in calculating a Ward's net income, Commissioners and District Officers are directed to take as assets of the estate all that would properly appear under headings II to V of Table VI of Return No. XXXI, and as charges those which would appear under headings VI to X and XII to XIV of the same Table.

Erratum.

In lines 3 and 4 of Circular Order No. 2, for the current month, for the words "14 A. Report on Wards' Estates," read "14. A Report on Wards' Estates." The same alteration should be made in the slip.

Supersedes Chapter X of the Board Rules, except Sections I and IV Clause 5 of Section VIII.

No. 5.

IN continuation of Circular Order No. 1 of February 1872, it is hereby notified that the whole of Chapter X of the Board's Rules is superseded, except Sections I and VI and Clause 5 of Section VIII, which are still in force in regard to territorial and political pensions only.

Additional Clause (5A) to Section 5, page 24, Board Rules, regarding applications for extra Budget grants.

No. 6:

THE following has been added as Clause 5A to Section V, page 24 of the Board's Rules—

An application for an extra budget grant should in no case be sent up, until the budget allotment of the Office or Department making the application has been exhausted, under the particular head of expenditure to which it is proposed to debit the disbursement for which funds are required. A certificate should be appended to each such application, that the balance in the Collector's hands at the time of submitting the application is less than the amount asked for.

JULY 1873.

HON'BLE V. H. SCHALCH.

Erratum.

For the words "as per column 5," in the heading of column 11, Appendix H, of the Land Acquisition Instructions, read "as per columns 5 and 6."

Additional Heading and an Alteration in Table I, Return No. XXVIII of 1873-74.

No. 1.

IN Table I, column 1 of Return No. XXVIII, for 1873-74, and future years, between headings "Shares held in common tenancy" and "Railway C. plots," insert the following additional heading, "Railway B. plots." And in the note at the top of Table I, directing that the original price of C. lands should be shown on the back of the Return, insert the words "B. and" before "C. plots."

All Excess Payments of Revenue or Rent to be excluded from Return No. XXXI.

No. 2.

In the preparation of future Returns No. XXXI, District Officers are requested to exclude all excess payments of revenue or rent,—*i.e.*, payments made during the year under report on account of ensuing years.

Cancels Clause 18, page 189 of Board's Rules.

No. 3.

SECTION 23, Regulation II of 1793, having been repealed by Act XXVI of 1871 clause 18, page 189 of the Board's Rules, is hereby cancelled.

A. MONEY, Esq., C.B.

Collectors, &c., to be careful that Stamps commonly used are always available at Subdivisions.

No. 4.

In continuation of Circular Order No. 6 of January 1873, District Officers are informed that, with reference to, an enquiry whether Subdivisional Officers might be empowered to sign the certificate contemplated in the Government Notification of 25th March last,* issued under Section 27 of Act VII of 1870 (the Court Fees' Act), the Government has ruled that it will be enough if the Collectors of Districts and the Subdivisional Officers are very careful that all the lower and more commonly used Stamps are *always* available at Subdivisions, so as to obviate the necessity of issuing the required certificate.

2. The Member in Charge now draws the attention of District and Subdivisional Officers to the necessity of strict compliance with the wishes of Government, and requests that Commissioners will at once report any neglect of these orders, should such occur.

* Vide p. 431 of the *Calcutta Gazette*, dated 2nd April 1873.

AUGUST 1873.

HON'BLE V. H. SCHALCH.

Returns Nos. XXXI and XLI to show only sums paid and received within the financial year.

No. 1.

As some diversity of practice has occurred in the preparation of Returns Nos. XXXI and XLI, the Member in Charge directs that they shall in future be made strictly financial, and not administrative, Returns, *i.e.*, that sums paid and received *within* the financial year, and those only, shall be entered in them.

HON'BLE H. L. DAMPIER.

Alterations in Section 5, Chapter XXI, of Board's rules, regarding the custody, &c., of Postage Stamp Labels.

No. 2.

With advertence to the new Rules for the custody, distribution, and sale of Postage Stamp Labels sanctioned by the Government of India, the following alterations are necessary in the Board's rules:—

In Section 5, Chapter XXI, page 307, expunge Clause 4, and after the word "time," in Clause 6, add, as a new sentence—For

the discount allowable on purchases of Postage Stamps, *vide* Rules published at pages 350—371 of *India Gazette*, dated 12th July 1873.

Draws attention to Financial Department Resolution, dated 24th July 1873, regarding the cancellation of adhesive Court Fee Stamps.

No. 3.

The attention of Divisional and District Officers is drawn to the following Resolution by the Government of India, in the Financial Department, No. 1763, dated 24th July 1873, regarding the cancellation of adhesive Court Fee Stamps, and they are requested to see that the orders of Government are invariably carried out:—

The Governor-General in Council has recently had under consideration the best method of cancelling adhesive Court Fee Labels, so that they may not be fraudulently used again.

2. Under Act VII of 1870, Section 30, Court Fee Labels are cancelled by punching out the figure head. But this does not perhaps afford sufficient protection, and pending further consideration of the subject, the Governor-General in Council directs that the record-keeper of every Court shall, when a case is decided, and the record consigned to his custody, punch a second hole in each label, distinct from the first, and note the date of his doing so at the same time. The second punching should not remove so much of the stamp as to render it impossible or difficult to ascertain its value or nature.

HON'BLE V. H. SCHALCH.

Alterations made in Circular Order No. 8 of April last, regarding Government Estates.

No. 4.

THE following alterations are to be made, in Circular Order No. 8 of April last—

Under heading e, "Government Estates under farming leases," for "farming" substitute "temporary."

For the first clause of the N. B., substitute—

"Under present Rules all Government Estates, settled for terms of years with purchasers of the proprietary right, pass out of the category of Government Estates, and become the property of the settlement-holders. Such estates will, therefore, be included under Class c."

"All Government Estates, settled for terms of years with persons to whom the proprietary right has not been transferred by sale, even though the right to conditional re-settlement has been conceded to the settlement-holders, must be regarded as temporarily settled estates, and be included in Class e. This class will also, of course, include Government Estates settled in farm,—i.e., for a definite term, without the concession to the settlement-holder of a right to re-settlement."

It will be necessary for Collectors to revise their Quarterly Returns No. X for the first quarter of 1873-74, in accordance with the above instructions.

The Superintendent of Stationery will be directed to issue revised forms and slips, but meanwhile the necessary alterations must be made in manuscript in the forms and slips already supplied.

Instructions to obviate discrepancies between the Quarterly Statements of Land Revenue Receipts, and Return No. X.

No. 5.

DISCREPANCIES between the Quarterly Statements of Land Revenue Receipts submitted to the Board by the Accountant-General and the figures of Return No. X have, in several instances, been traced to the fact that estates upon which revenue had been paid in advance into the treasury of one district, had, before the instalments which such advance was intended to meet fell due, been transferred to the Revenue Roll of

another district. To obviate the necessity of calling for frequent explanations, the Member in Charge directs that, whenever any such payments in advance stand to the credit of an estate at the time of transfer, the transferring Collector shall, in all cases, carefully notify to the Collectors of the districts to which the mehals have been transferred the exact position of each mehal in regard to realization of revenue. And the exact facts as regard such transferred mehals should be noticed in the Return No. X both for the district from, and the district to, which they are transferred.

In Reports on cases under the Land Acquisition Act X of 1870, District Officers to note in column 3, Appendix F, whether the General Notice under Section 9 of the Act has been issued.

No. 6.

THE Member in Charge requests that District Officers, when submitting their final reports in connection with cases under the Land Acquisition Act X of 1870, will be careful to note in column 3 of Appendix F, whether the general notice required under Section 9 of the Act has been issued.

SEPTEMBER 1873.

HON'BLE V. H. SCHALCH.

The numbers and dates of vouchers on which compensation under Act X of 1870 has been drawn should be shown on reverse of Appendix I.

No. 1.

WITH a view to obviate frequent references which the Accountant-General now finds it necessary to make, District Officers are requested, in future, when submitting their final proceedings in connection with the acquisition of lands taken up for public purposes under Act X of 1870, to furnish, on the reverse of Appendix I, the numbers and dates of vouchers on which the amounts of compensation, &c., shown therein have been drawn from the Treasury.

The treatment of 4-anna and 2-anna pieces to be shown separately under clause 1d of the revised rules under Indian Coinage Act.

No. 2.

IN continuation of the Board's Circular Orders marginally cited, District Officers are requested, in future, when submitting their annual report on the working of the Indian Coinage Act, to show the treatment of 4-anna and 2-anna pieces under clause 1d of the revised rules, published with the Circular Order of November 1872, separately from the treatment of pieces of higher value.

No officer to be recommended for investment with powers under Act X of 1870, unless Collector is satisfied he is well qualified for that purpose.

No. 3.

A CASE has recently come before the notice of the Member in Charge, in which a Deputy Collector, entrusted with the conduct of the operations for acquiring certain land for public purposes, was shown to have utterly disregarded the procedure prescribed. The Member in Charge desires, therefore, that no officer may be recommended for investment with powers under Act X of 1870, unless the Collector to whom such officer is subordinate is satisfied that he is well acquainted with the provisions of that law and the rules promulgated thereunder.

Publishes Government orders of 12th August 1873 for information of Commissioners as Courts of Wards.

No. 4.

THE following extract from the orders of the Government of India, No. 317 of 12th August 1873, is published for the information of Commissioners as Courts of Wards:—

Para. 3.—“As regards wards' estates His Excellency in Council considers that, when such an estate which is in a solvent condition, is being administered by Government officers, whatever sum it is found possible to set aside for educational purposes should be employed in supplying the recognized needs of simple primary education to the poorer classes resident on the estate; but it is not within the competency of Government, in its character

“of trustee, to make any educational arrangements supported from the funds of the trust which shall be of a permanent character, or binding upon the ward after the estate shall have passed out of the hands of Government.”

In modification of previous Circular, requires notices of relinquishment and notices of enhancement under Sections 14 and 20, Act VIII (B.C.) of 1869 to be shown under separate heads in Return No. VIII.

No. 5.

IN modification of Circular Order No. 6 of May 1872, District Officers are hereby informed, that notices of relinquishment, and notices of enhancement, served by orders of the Collector, under Sections 14 and 20, Act VIII (B.C.) 1869, should be shown, each class under a separate head of its own, in Return No. VIII.

The Superintendent of Stationery will be directed to issue revised forms of the Return, but, meanwhile, the additional headings must be entered in manuscript in the forms now in use.

OCTOBER 1873.

HON'BLE V. H. SCHALCH.

Errata in Memo. on Revenue Administration of Bengal.

Errata.

In the foot-note of page 36 of the Memo. on the Revenue Administration of Bengal, lately distributed by the Board, for “1857,” read “1837.”

Page 38, para. 45, line 2, for “rather more than 1,900,” read “about 720.”

Page 124, line 19, transfer the word “Company” to the next line after the word “Dock.”

Appendix, page xvii, line 21, for “capsularis” read “capsularis.”

„ page xviii, line 14, for “aculiata,” read “aculeata.”

„ page xviii, line 36, for “muerba,” read “murba.”

„ page xix, line 16, for “Linum” read “Linum.”

OCTOBER 1873.

HON'BLE V. H. SCHALCH.

Reports, &c., connected with island formations under Act IV (B.C.) of 1868, to be treated as confidential.

No. 1.

ALL reports and orders connected with island formations, which have been taken possession of by Government under Act IV (B.C.) of 1868, should be treated as confidential. Divisional and District Officers are, accordingly, prohibited from granting copies of such communications to private individuals without first obtaining the orders of the Board.

Additions to Rules under the Land Acquisition Act X of 1872.

No. 2.

To the rules already made and promulgated by the Government of Bengal under the provisions of Section 59 of Act X, 1870 (the Land Acquisition Act), the following additions have now, by the same authority, been made, and these additional rules will, accordingly, have the force of law, *vide Calcutta Gazette* of 10th September 1873, page 1059 :—

RULE IX.—On the date on which payment of compensation in any case may become due under Section 41 of the Act, the Collector shall tender the amount to such of the persons entitled to receive it as may be present at his office in person or by agent duly authorized to receive the same. Should any such person be absent and have no authorized agent at the Collector's Court, the Collector shall serve a notice upon him, calling upon him to attend in person, or by agent, within one week of his receipt of the notice, to receive the amount due to him; and warning him that, on failure to appear, the money will be invested in Government securities, and that no interest will be allowed in excess of the interest payable on such securities. Should such person neglect to appear within the time specified, the Collector shall, on being satisfied of the due service of the notice, invest the amount of the compensation money due to such person in Government securities, and hold the same in deposit, until the amount shall be applied for by the person entitled to it.

On the application of such person, the Collector shall make over the Government securities to him, or shall sell the securities

and make over the amount realized to him, and at the same time pay to him any cash balance which has been too small for investment, together with interest on such balance calculated at four per cent. The Collector shall follow the same course in regard to any compensation money which may be refused by a person entitled to receive it, provided that such investment shall be limited to even sums of Rs. 500, or multiples of Rs. 500. The amount of compensation, if less than Rs. 500, and any fractional parts, if the compensation is above that sum, shall be held by the Collector in deposit, bearing interest at four per cent.

RULE X.—From and after the date of investment of compensation money under the last preceding rule, no interest on the amount so invested shall be allowed in addition to that due on the said securities.

RULE XI.—Similarly, when a Collector has referred a case to the Civil Court under Sections 15, 38, or 43 of the Act, he shall at once invest the amount of compensation awarded by him in Government securities. In all cases of reference under Section 38, and in cases of reference under Section 15 or 43, in which the Collector's award shall be confirmed by the Court, no interest on the amount so invested shall be allowed in addition to that due on the investment. Whenever, in a case of reference under Section 15 or 43, a higher sum than was awarded by the Collector shall be awarded by the Court, the Collector shall pay to the persons entitled to receive it the difference between the amount of interest which may have accumulated on the Government securities from the date of investment, and the amount of interest, calculated at six per cent. under Section 42 of the Act, from the date of the taking possession of the land.

HON'BLE H. L. DAMPIER.

Occasional inspection to be made by heads of offices to ensure the effectual punching and defacement of stamps.

No. 3.

IN continuation of Circular Order No. 3 for August last, and under instructions from Government, heads of all offices in which stamps are used or filed are required to cause an occasional inspection to be made of documents that have been filed, in order to ascertain that the stamps have been properly punched and defaced, and have not been subsequently removed from the documents

on which they were used. The inspection should be made at least once a quarter.

2. If the hole which is first punched on a used stamp be round, the second hole, which is to be punched on it under Circular Order No. 3 of 3rd August last, should be either square or triangular.

HON'BLE V. H. SCHALCH.

Errata in Memo. on Revenue Administration for Bengal.

Errata.

At page 131, line 22 of para. 198 of the Memo. on the Revenue Administration of Bengal, for "states," read "estates."

Page 133, line 10 of para. 200, for "Provinces," read "Lower Provinces."

Page 140, line 5 of para. 209, for "all," read "an."

Points out mode of exhibiting, in Return No. XXXI, the financial position of such portions of a Ward's Estate as may be leased out in Behar under a zar-i-peshgi arrangement.

No. 4.

THE question having been raised as to the proper mode of exhibiting, in Return No. XXXI, the financial position of such portions of a ward's estate as may be or may have been leased out under the arrangement known in Behar as zar-i-peshgi, whereby a creditor is placed in possession of a certain tract rent-free till he shall have recouped himself for a loan to the estate, the Member in charge is pleased to issue the following instructions on the subject.

For the purposes of Table I of the Return, the portion of the estate affected by each transaction of the kind described should be treated as a separate estate or tenure and entered in a separate and separately numbered series A₁ or B₁, according as it would fall under heading A or B if not leased out in zar-i-peshgi.

If the whole of an estate borne upon the revenue-roll of the district, or the whole of a revenue-free estate, or of an estate or tenure leased from a private proprietor, be so treated, there will be no difficulty in filling up Table I for such estate or tenure. But if only a portion of an estate

or tenure be so pledged, it will be necessary to divide such estate or tenure into two parts, one of which will appear under the head A, or B, the other under A₁ or B₁. In this case the revenue or rent due from such estate or tenure should also be divided into two portions, so that the revenue or rent due from the portion shown under heading A₁ or B₁ shall bear the same ratio to that due from the whole estate or tenure as the income of the portion bears to the income of the whole. The factors necessary to work the proportion must be known to the Collector, for in the case of an estate borne on the revenue-roll the taujil, or, in case of a tenure leased from a private proprietor, the deed of lease, will show the whole revenue or rent; the accounts of the estate will show the income of the unpledged portion; and the zar-i-peshgi deed will show the income of the portions made over to the zar-i-peshgidar.

The entries in columns 2—9, inclusive, of Table I will all have to be distributed in these proportions.

In Table IV debts incurred on the security of zar-i-peshgi leases should be entered under a separate heading B, and thus shown separately from other debts, which would be entered under head A. The parenthetical instruction against XIV, Table VI, should accordingly now run "(Table IV, heading A, columns 6 and 7)."

Each zar-i-peshgi lease should be noticed in the explanation, and the tenures or estates affected by it named, the term and conditions of the lease being also stated.

Amount of revenue written off as matter of right to be shown in Table IV, Return No. X, separately from amount remitted as a matter of grace.

No. 5.

In submitting explanations of remissions of revenue in Table IV of Return No. X, District Officers are requested to specify separately, in future, the amount of revenue written off as a matter of right, and the amount remitted as a matter of grace. The former should comprise remissions granted under any law in force for the time being, or under existing orders of Government or under written agreements held by the parties concerned, while the latter should include the amounts remitted for such causes as deterioration of land, insolvency of farmers, or death or desertion of ryots, and full explanations in these instances should always be furnished.

Maximum expenditure of 36 rupees allowed in partitioning an estate of 100 acres.

No. 6.

IN continuation of Circular Order No. 2 of August 1872, the Member in charge is pleased to rule that, in effecting the partition of an estate less than 100 acres in extent, District Officers may incur any necessary expenditure on account of establishment not exceeding the charge (Rs. 36) laid down in the Circular Order cited above, as the maximum for an estate of 100 acres.

Addition and correction in Board's Rules, pp. 119 and 225.

No. 7.

THE following addition and correction are made in the Board's Rules—

Clause 12, Section IV, Chapter VI, page 119, after the word "employed," add "or in any other District."

Section IV, Chapter XIV, page 225, in the heading of Register No. 71, erase the words "in the District."

NOVEMBER, 1873.

HON'BLE V. H. SCHALCH.

Alteration in Cl. 4, Sec. VI, Ch. XIII of Board's Rules, regarding Stamps.

No. 1.

FROM Clause 4, Section VI, Chapter XIII of the Board's Rules, omit the words—"The

copies may be on unstamped paper, but cannot be authenticated with reference to Article 32, Schedule A, Act X of 1862," and substitute the following—"The copies must be on stamped paper under Clause 9 of Schedule I of the Court Fees' Act VII of 1870, and the words composing such writing as they contain must be computed in order that the copies may be made on stamped paper of proper value."

Substitutes half-yearly reports in place of the annual report on the working of the rules for carrying out the provisions of the Indian Coinage Act.

No. 2.

THE Government of India having directed the discontinuance of the annual report on the working of the rules for carrying out the provisions of the Indian Coinage Act (XXIII of 1870), and directed the submission in future of half-yearly returns, District Officers are hereby informed that a half-yearly report should be submitted in the same form and giving the same information as the annual one prescribed by the Board's Circular Order No. 8 of August 1871, supplemented by Circular Order No. 2 of September 1873. The report for the first half of the calendar year 1873 should be submitted at once, and that for the second half as soon after the year closes as possible.

Addition to Cl. 1, Sec. 12, Ch. VIII of Board's Rules, regarding payment of revenue of lands.

No. 3.

THE following addition is made to Clause 1, Section 12, Chapter VIII of the Board's Rules—

"But in Assam and Chota Nagpore, the revenue of lands within the limits of a subdivision may be paid into the sub-divisional treasury."

Directs that note be made in sale papers at the time of sale, showing the probable cause of sale of an estate sold for arrears of revenue.

No. 4.

In the Resolution upon the Board's Land Revenue Report for 1872-73, His Honor the Lieutenant-Governor has recorded the following observations on the subject of the working of the provisions of Act XI, 1859, for the realization of revenue by sale of estates—

"13. Paragraph 53 of the present report shews that no less than 762 estates were sold for arrears of revenue during the year under review. The Lieutenant-Governor would here take the opportunity to express his dissent from the broad statement (paragraph 116 of the memorandum) that 'there can be no manner of doubt that, on the whole, the working of the Sale Law has been most beneficial and satisfactory.' Paragraph 115 of the memorandum seems to shew that estates often go to sale for what the Lieutenant-Governor must think illegitimate reasons; and he wholly doubts the advantage set forth in paragraph 118 of the memorandum, of giving proprietors, who take advantage of the Sale Law, the means of realizing the very highest value for a property which would not fairly sell for so much. The enhanced price in fact is gained because the sale of an estate for arrears of revenue obliterates and defeats many private rights and liens on the land sold. It amounts to creating an Encumbered Estates Court at the option of the present possessors and for their benefit only. The Lieutenant-Governor doubts if such stringent sale laws are now required. At any rate he records these remarks as a caution against the broad statement that 'there can be no manner of doubt' regarding the conclusions summed up at paragraph 123 of the memorandum."

The Member in charge desires, therefore, that every care may be taken to watch and record, as far as they can be ascertained, the true causes which lead to sales of estates for arrears of revenue; and with that view directs that, at the time of sale, a note should be appended to the sale papers of each estate sold for arrears of revenue shewing the probable cause of sale, whether such cause be diluvion, quarrels among sharers, or other circumstance. The notes thus recorded at the time, each Collector should analyse when

noticing the subject of sales for arrears of revenue in his Annual Land Revenue Report.

Amends Cls. 2 and 3, Para. 2, S. XII of Board's Rules, regarding payment of land revenue.

No. 5.

CLAUSES 2 and 3, paragraph 2, Section XII, page 155 of the Board's Rules, are amended as follows—

2. In addition to the amount of revenue, a fee of two annas on each hundred rupees or fraction thereof to be charged up to Rs. 500, and one rupee upon any larger sum up to Rs. 1,000, and for every further fraction of Rs. 1,000.

Note.—The Railway Companies are exempted from this charge when they have to remit rents of C. Class lands.

3. Only one such receipt is to be granted to one remitter for each instalment; the particulars of the properties on account of which the remittance is made must be carefully detailed on the reverse, and the form filled up thus—

Received from A. B., on account of C. D., proprietor, the sum of Rs. on account of land-revenue demands to be transferred to his credit under land-revenue, as per particulars on reverse, at the Treasury.

Expunges Return No. XXVIII regarding land revenue, and amalgamates it with an amended form of Return No. XLI.

No. 6.

THE Government, having directed the discontinuance of the Board's Land Revenue Preliminary Report, Return No. XXVIII has been amalgamated with Return No. XLI. An amended form of the latter return will hereafter be supplied by the Superintendent of Stationery to all District Officers. This return must be carefully filled up and submitted to the Board on the due date.

Return No. XXVIII should be expunged from the "list of returns" at page 262 of the Board's Rules.

Cancels Section 7, Chapter XVIII of Board's Rules, substituting new rules for them,—regarding Annual Land Revenue Report.

No. 7.

SECTION VII, Chapter XVIII of the Board's Rules is hereby cancelled, and the following substituted in its place:—

SECTION VII.

Annual Land Revenue Report.

1. Each Commissioner's divisional report should begin by giving a memorandum of the date of the district reports and the date of their receipt.

2. This and any other preliminary matters which it may be necessary to touch upon, having been briefly disposed of, the report should proceed to its first main Section, *settlement and collection of land revenue.*

3. Under this head should be described

* 1. Permanently-settled estates.

2. Estates, the property of individuals, temporarily settled.

3. Government estates.

4. Ryotwari tracts.

the classification of estates, according to the four-fold* division laid down by Government, the relative predominance of

the several classes being noticed. Any important changes in the revenue-roll, whether within any class, or between class and class, should be accounted for. The state of the collections should then be briefly noticed. It is not necessary to go into every detail of arrear, real or fictitious. The statements from each district enable the Board to analyse these. But any arrears of moment should be explained, and the state of collections in estates belonging to each of the four classes should be compared. Under this head, too, the balances of Government revenue on Wards' and attached estates should be commented on and explained. Here also should be noticed the remissions allowed; those written off as a matter of grace as distinguished from those claimable as a matter of right, being fully accounted for (*vide* Circular Order No. 5 of October 1873). Irrigation, so far as it need be noticed in the land revenue report, should form a sub-head of this Section. It must be borne in mind that in supplying the particulars required by this paragraph, it will not

be necessary to give information that is apparent on the face of Return No. X. Statistics as such should be excluded; but any special features of the year's operations may be illustrated by figures. This, however, can be done without the lengthy analysis of demands, collections, and balances at present given.

4. Then should follow an account of the settlements in progress, with any observations that may suggest themselves as to the rates of settlement, the term, the persons settled with, the rights of tenants, and, generally, the policy pursued. Here also may be noticed any peculiarities in regard to malikana allowances.

5. Next should be noticed the management of Government estates held under khas management, and of ryotwari tracts. It has already been laid down that Government estates which yield no rent should nevertheless be included in Return XII. Where there are many such unassessed estates, the causes of non-settlement should be explained. The working of tahsildari and other establishments of the kind should be specially reported on, as also the efficiency for this portion of their work of the recently sanctioned sub-divisional establishments of sub-deputies, kanungos, and surveyors, with their subordinates. Here, too, will be the place to introduce any remarks on local peculiarities of settlement or tenure.

6. So far of the first main Section. The subjects noted in the margin should then be separately noticed in the order in which they are numbered, but only so far as illustrated by the figures of the year. It will not be necessary in each annual report to repeat *de novo* facts, or discussions of facts, already fully on record. The causes which have led to estates coming to the hammer during the year, should, as far as possible, be explained. Under the head of Partitions, all cases pending more than two years should be noticed and accounted for.

7. The subjects marginally named should then be noticed each in a separate Section. The management by Collectors of cases under Act X of 1870 should be specially commented upon. Under the head of rent-laws, in districts where Act X of 1859

is no longer in force, it will be necessary to detail any facts connected with the service of notices of enhancement or relinquishment, and this will be the place for any observation on the general relations between landlords and tenants. Circular Order No. 5, September 1873, prescribes the maintenance of an accurate record of notices of enhancement and relinquishment issued under Act VIII (B.C.) of 1869.

8. The report should conclude by noticing the minor subjects specified in the margin, the standing orders on which are here for convenience collected and republished.

- 12. Office inspections.
- 13. Securities and transfer of ministerial officers.
- 14. Sub-divisional treasuries.
- 15. Records.
- 16. Merits of officers.

9. Circular Order No. 8 of August 1870 thus lays down the instructions for district office inspections—

“With a view to ensuring a more careful supervision by District Officers of the details of office management, the Board direct that in future every District Officer shall make a half-yearly inspection of all branches of his office, guiding his enquiries by the rules, so far as they are applicable, contained in Clauses 2 to 17, pages 174, 175, Board’s Rules, which point out the principles on which Commissioners’ inspections are to be conducted—

“Each District Officer will report the result of his examination in detail to the Commissioner on the 1st days of April and October, respectively.

“Commissioners will notice these reports in their Annual Administration Reports, stating their opinions, in respect to each District Officer subordinate to them, respectively, as to the care and efficiency with which his half-yearly inspections have been carried out.”

It has recently been ordered that these inspections should not be made at fixed times, but irregularly and without notice.

10. The following passage occurs in Securities of ministerial Circular Order No. 2 officers. of September 1871, with reference to Return No. XXXVI—

“This return should in future be made to the Commissioners only, who should certify in their Annual Land Revenue Administration Reports, that the orders of Government regarding securities have been carried out in each of the districts of their divisions;

respectively, explaining fully every case of failure.”

11. If any transfers of Ministerial Officers are made under the provisions of Clauses 14 to 16, page 119, Board’s Rules, they should be mentioned.

12. A return for the year in the form of Commissioner’s annual Return No. VII, and revenue statement, a memorandum of receipts on account of record fees in the Commissioner’s office, as required by Clause 2, Section VII, page 211, Board’s Rules, should be appended.

13. In an Appendix to each District Merits of officers in Collector’s Report is to be a statement with the following headings:—

1. Names of subordinate officers, arranged, in each class, in order of their merit, from a purely revenue point of view, according to Collector’s judgment.
2. Dates from and to which employed.
3. Nature of employment.
4. Collector’s opinion.

The names of all the officers subordinate to the Collector are to be entered in this statement classified as follows:—

- (a). Covenanted officers who have passed the second standard examination.
- (b). Covenanted officers who have passed the first standard examination.
- (c). Covenanted officers who have not passed any examination.
- (d). Uncovenanted officers who have passed the second standard examination.
- (e). Uncovenanted officers who have passed the first standard examination.
- (f). Uncovenanted officers who have not passed any examination.

14. In like manner, as an Appendix to and in Commissioner’s the Divisional Report, the Commissioner is to furnish a statement, with the following headings, for the whole division without distinction of districts; the classification of names is to be as in the district statement, the District Officers being, however, placed at the head of all—

1. Names of all officers in the division, arranged, in each class, in order of their merit, from a purely revenue point of view, according to the Commissioner’s opinion;
2. District in which employed;
3. Date from and to which employed;
4. Nature of employment;
5. Abstract of Collector’s opinion;
6. Commissioner’s opinion.

15. The instructions in the preceding Clause have been modified, but not superseded

by Circular Order No. 6 of December 1870, which runs as follows:—

“The Board observe that Commissioners are frequently apt to recommend officers for favorable notice, in their Yearly Land Revenue Report, on insufficient grounds. In all such future Reports, every gazetted officer employed in revenue work under a Commissioner should be placed by him in one of four classes, headed Bad, Average, Good, Very Good. In this last class only officers of exceptionally good qualifications should be entered, and remarks should be made only as regards those in the first and the last classes. As regards these, it should also be stated in detail what kind and what general amount of revenue business each officer has done during the year under report.”

16. When either a Collector or a Commissioner vacating office to leave memorandum. Commissioner quits office towards the close of the year, he must prepare the statement required from him, under Clause 13 or 14 and 15, as the case may be, before he makes over charge to his successor. The duty of his successor, under such circumstances, is confined to a general expression of opinion upon the statement, unless he has sufficient ground for offering any detailed opinion.

17. Circular Order No. 17 of March 1869 is as follows:—

“The Board consider it exceedingly desirable that young officers should be encouraged to make themselves, as soon as possible, fully and practically acquainted with everything relating to the survey maps and records (including the mehalwar and mauzawar registers), particularly with the manner in which property is sub-divided and shown in the maps. A great deal of most useful information as to the tenure of land, &c., is contained in these documents. They are, moreover, constantly filed as exhibits, and, if thoroughly understood by the Presiding Officer, are often of great assistance in the disposal of cases of many kinds. The Board, therefore, desire that Collectors and Commissioners will at once take such measures as will ensure the above. Commissioners, when on circuit, will carefully ascertain how far this Circular has been attended to, and will mention the subject in their Annual Report.”

18. Divisional Reports need not notice the following subjects:—

(a). Mofussil tours of Commissioners and Collectors.

(b). Crops and weather, except in so far as the land revenue has been affected.

(c). Tea cultivation, with the same reservation.

(d). Conduct of Government suits,—this subject being separately reported on by the Legal Remembrancer.

(e). Development of Paper Currency, now fully treated by the Accountant-General.

(f). Collectorate libraries, except as a branch of office inspection, to be noticed if anything calls for special remark.

Makes additions to “Instructions for the administration of the Land Acquisition Act X of 1870.”

No. 8.

THE following alterations in, and additions to, the “Instructions for the administration of the Land Acquisition Act X of 1870,” have been approved by the Member in charge:—

“9A.—The special attention of Collectors is drawn to the necessity for making their initial estimates (whether under Rule 6 or Rule 9) of the cost of land to be taken up, as accurate as possible. Careless estimates not only throw out the calculations of the department for which the land is to be acquired, but, if they err by excess, are likely, though in no way binding on Government, to prejudice the public interests by giving color to extravagant claims at a later stage of the proceedings.

“9B.—If at any time before award or reference to the Civil Court, the Collector shall have reason to believe that the cost of acquisition will considerably exceed the estimate, he should at once stay proceedings and report the probability of such excess to the Executive Engineer, in the case of land required for Public Works purposes, or, in the case of land required for other departments or for a company, to the chief local representative of the department or company for which it is required, with the view that it may be ascertained whether the object sought cannot be otherwise secured, either by obtaining some other plot of land than that originally contemplated, or in any other way.”

For the first five lines of Rule 19A, substitute the following:—

“Whenever proceedings under the Act are conducted by an Assistant or Deputy Collector empowered, under the provisions of Section 3, to act as a Collector, such officer shall, before making any tender of compensation to persons interested under

Section 11, report his proceedings in view to obtain the approval and confirmation of the Collector of the District to the amount of compensation which he proposes to tender."

"19B.—In cases where the amount of compensation which it is proposed to tender exceeds Rs. 10,000, a reference should be made to the Commissioner, whether the officer conducting the proceedings be the Collector himself or a subordinate empowered under Section 3 of the Act. In the former case, the Collector should, after making the requisite enquiries under Section 11, postpone his final award under the provisions of Section 12, and report his opinion on the case to the Commissioner, forwarding at the same time all documents which may seem necessary to enable that officer to judge of the propriety of the proposed award. Similarly, in the second case, the necessary papers should be forwarded to the Commissioner with the Collector's own opinion on the propriety of the tender proposed by the officer empowered under Section 3. The Commissioner may either confirm the proposed tender, or call for further information, if necessary, on any point."

"19C.—Commissioners and Collectors will be held responsible for these references being disposed of with despatch. Any unnecessary delay in dealing with such cases not only embarrasses the department for which the land is required, but may seriously enhance the price; for it has been ruled that, on a reference to the Civil Court, the Judge and Assessors are bound to consider the market-value of the land *at the time of the award of compensation by the Court*. Hence if, from any cause, the market-value rises in the interval while the papers are under consideration of the Commissioner or Collector, as the case may be, the original estimate may be greatly exceeded. And the knowledge that proceedings are pending may of itself tend to enhance the market-value of land."

Requires enfacement of certificate on bills debitable to the Wards' Rate Fund, where the bills include charges for postage, &c.

No. 9.

"THE certificate required from disbursing officers on their contingent bills, under the orders of Government published in Accountant-General's Circular Order No. 268 of 25th March 1873, must in future be enforced on bills debitable to the Wards' Rate Fund,

where the bills include charges for postage, stationery, contingencies, &c.

It is also necessary for disbursing officers to give the details of expenditure, under the above heads, both in the vouchers, which must accompany the bill, and in the bills themselves.

Indents should at once be made on the Superintendent of Stationery for the form of Wards' bill, revised in accordance with this ruling.

A. MONEY, Esq., C.B.

Circulates Financial Department Order drawing attention to an instance of fraud in a District Stamp Office, and directing precautions to be taken when Collector grants refund or renewal of stamps.

No. 10.

THE following order of the Government of India, in the Financial Department, No. 3767, dated 23rd October 1873, is published for the information and guidance of all officers in the Revenue Department:—

"Frauds were lately committed in the Stamp Department of a certain District Treasury, under circumstances which render it expedient for the Governor-General in Council to publish the facts as a caution to all District and Treasury Officers.

"In pursuance of a conspiracy between the Stamp Accountant, several office clerks, and the Treasurer's subordinates, and owing to the lax supervision of the Treasury Officer and Collector, stamp papers, sometimes endorsed with fictitious sale entries, and sometimes obtained from the Court records, were presented by one of the treasury officials under fictitious names with petitions for refund, and refunds were granted by the Treasury Officer. The Stamps were then withdrawn from the records, not transmitted to the Commissioner of Stamps, but used over and over again for the purpose of obtaining refunds. Remarks on the Accountant-General's objection statement were drafted by the head clerk to the effect 'that the Stamp Commissioner's receipt had not yet reached the office,' or 'that it would follow,' and perfunctorily signed by the Treasury Officer.

"The Governor-General in Council would, therefore, take this opportunity to draw attention to Section 45, Act XVIII of 1869, under the provisions of which the Collector of the district alone can grant refunds of the

value of stamps. Officers in charge of treasuries must accordingly refer to him for separate orders in every such case.

His Excellency in Council also directs that when the Collector of a district sanctions a refund or renewal, he shall then and

there record his reasons for granting such refund or renewal, shall punch or mark the stamped paper in such a way that it can never be presented again, and shall then forward it for destruction to the Commissioner (or Superintendent) of Stamps."

RULES AND ORDERS OF THE HIGH COURT.

- Requires Magistrates to note in Quarterly Statement D the names of those Magistrates who have served on Benches during Quarter under report.

CRIMINAL CIRCULAR MEMO. No. 3.

- From the Registrar of the High Court of Judicature at Fort William in Bengal,
- Appellate Jurisdiction, to all Magistrates of Districts, dated the 26th May 1873.

(Criminal Side.)

Present :

The Hon'ble Louis S. Jackson, Judge.

MAGISTRATES of Districts are requested to note, in future, on the back of Quarterly Statement D, the names of those Magistrates who have served on Benches during the Quarter under report.

2. The ensuing Statement (for April, May, and June) to contain the names in question for the 1st and 2nd Quarters.

Lays down new rule regarding the inspection of Moonsiff's Courts.

CIVIL CIRCULAR ORDER No. 9.

- From the Registrar of the High Court of Judicature at Fort William in Bengal,
- Appellate Jurisdiction, to all District Judges and Judicial Commissioners, dated the 29th May 1873.

(Civil Side.)

Present :

The Hon'ble Sir Richard Couch, Kt., Chief Justice, and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, Judges.

The Court is pleased to rescind paragraph 3 of Circular Order No. 15, dated 14th May 1864, and to replace it by the following rule, which should be read as a part of the Circular in question.

- 2. Every inspection of a Moonsiff's Court, under Circular Order No. 15 of 1864, when completed, is to be reported to the High Court. The report should comprise the particular subjects mentioned in the several Circular Orders noted in the margin, and should contain the result of the Judge's observations on the Moonsiff's mode of doing business in respect of ability, temper, vigor, discretion, and punctuality; the state of his office including "accounts," and the absence or frequency, as the case may be, of complaints. The Judge, however, will doubtless remember that, while his mission is, on the one hand, to observe and correct errors, he is also to encourage, assist, and advise; he should clearly and courteously explain all difficulties occasioned by inexperience, change of system, or possible ignorance of the English language, and should invite the freest communication on all topics of mutual concern.

Empowers District Judges to entertain establishments required for Additional Subordinate Judges.

CIVIL CIRCULAR MEMO. No. 10.

- From the Registrar of the High Court of Judicature at Fort William in Bengal,
- Appellate Jurisdiction, to all District Judges, dated the 29th May 1873.

(Civil Side.)

Present :

The Hon'ble Louis S. Jackson, Judge.

- In continuation of Circular Memo. No. 2, dated 24th January 1872, District Judges are, under the authority of Government, hereby informed that* "the rule under which" they "have been authorized to entertain an establishment

* Vide Letter from Officiating Under Secretary, Government of Bengal (Judicial Department), to Officiating Accountant-General, No. 2341, dated 12th May 1873.

for each Additional Moonsiff on his appointment without reference to Government, may be applied to the entertainment of establishments required for Additional Subordinate Judges."

Directions to be observed in the matter of the issue, &c., of commissions to examine absent witnesses.

CIVIL CIRCULAR ORDER No. 10.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Authorities subject to the High Court, dated the 31st May 1873.

(Civil Side.)

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges*.

By Section 175, Code of Civil Procedure, it is provided that commissions to examine absent witnesses "shall ordinarily be issued to the Court within whose jurisdiction the witness may reside, and which can most conveniently execute the same; but, under special circumstances, the commission may be issued to any other person or persons whom the Court issuing the commission may think proper to appoint."

2. The privilege of obtaining such commissions, in respect of which no fee is at present levied, is largely used, and the duty of acting under such commissions is often a serious addition to the duty of the various Judges.

3. At the same time the business of the Civil Courts has almost universally so

increased that they ought not to be called upon to perform this additional duty; and notoriously from their frequent inability to perform it, great delay and inconvenience arise.

4. The High Court is of opinion that this state of things should be held to constitute "special circumstances," under which it is competent to the Civil Courts to issue commissions to other persons.

5. The High Court considers further that the proper persons to execute such commissions will usually be the pleaders of the District Court, or those Pleaders of the Moonsiff's Court who have passed examinations under Act XX of 1865. The Court, therefore directs that—

I. When such commission is applied for, the Court issuing the same shall make choice of some Pleader practising in the Court within whose jurisdiction the witness resides, and issue the commission accordingly.

II. For the remuneration of the commission so appointed, the Court shall require the party applying to pay in a fee of Rs. 4 for each witness to be examined, if the Court be that of a Moonsiff, or of Rs. 10 for each witness in the case of any higher Courts; and the commission shall not issue until such fee be paid.

III. The commission, together with the amount of the fee, shall be sent to the Court in which the Commissioner is a practising Pleader, and the commission shall be immediately delivered to him (unless he refuse to act). If the witness or witnesses appear before him and are examined so that he can make a return within the time limited, on his returning the commission duly executed, the fee shall be paid over to him, otherwise it shall be sent back together with the commission to the Court which issued it.

IV. Every District Judge shall furnish, on application, the Judge of any neighbouring district a list of all Pleaders attached to the several Courts in his district, who are qualified and willing to execute such commissions under these rules.

V. The foregoing rules do not apply to cases coming under Section 176, Code of Civil Procedure.

VI. Every subordinate Court, including the Mofussil Courts of Small Causes, shall furnish to the District Court, at the close of

each quarter, a return of the commissions which it has issued during such quarter in the form annexed : and the District Court shall furnish a general return in the same form to the High Court.

In continuation of previous Circular enjoins latest hour at which Judges should be on the Bench.

CIVIL CIRCULAR ORDER No. 11.

*From the Registrar of the High Court of
Judicature at Fort William in Bengal,
Appellate Jurisdiction, to all Civil
Courts subordinate to the High Court,
dated the 31st May 1873.*

(Civil Side.)

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges*.

At the instance of His Honor the Lieutenant-Governor of Bengal, and in continuation of Circular Order No. 7, dated the 7th March last, the Court hereby prescribes 11 o'clock A.M. as the latest hour at which Judges of all classes should be *on the Bench*; exception being made in the case of districts where, and at seasons when, it is usual to hold early morning sittings.

2. The District Judge will be held responsible for seeing that this order is carried out by his subordinate Courts.

*Sessions Judges and Magistrates to submit their
Quarterly Criminal Returns D and E in
duplicate.*

CRIMINAL CIRCULAR MEMO. No. 4.

*From the Registrar of the High Court of
Judicature at Fort William in Bengal,
Appellate Jurisdiction, to Sessions
Judges and Magistrates of Districts,
dated the 7th June 1873.*

(Criminal Side.)

Present :

The Hon'ble Louis S. Jackson, *Judge.*

SESSIONS Judges and Magistrates * of Districts are hereby directed to submit their Quarterly Criminal Returns D. and E *in duplicate* (copies being required for Government,) beginning with those of the current Quarter.

2-B

*Prescribes Forms of Oaths and Affirmations
under s. 7 Act X of 1873.*

CIRCULAR ORDER No. 12.

*From the Registrar of the High Court of
Judicature at Fort William in Bengal,
Appellate Jurisdiction, to all Civil and
Criminal Authorities, Regulation and
Extra-Regulation Provinces, dated the
7th June 1873.*

(Civil and Criminal Sides.)

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief
Justice, and the Hon'ble L. S. Jackson,
the Hon'ble F. A. Glover, and the Hon'ble
W. Ainslie, *Judges.*

THE following forms of oaths and affirm-
ations are prescribed by the High Court of
Judicature at Fort William in Bengal under
Section 7 Act X of 1873.

2. The same forms will be used in
criminal as in civil cases.

3. Christian witnesses, interpreters, and
jurors, to whom oaths are administered, are
to be sworn upon the New Testament.

4. In other cases the oaths are to be
administered upon such symbol, or accom-
panied by such act as may be usual, or
as such witness, interpreter, or juror may
acknowledge to be binding on his conscience.

FOR WITNESSES.

Oath.

I swear that the evidence which I shall
give in this case shall be true, that I will
conceal nothing, and that no part of my
evidence shall be false.

So help me God.

Affirmation.

I solemnly declare that the evidence which
I shall give in this case shall be true, that I
will conceal nothing, and that no part of my
evidence shall be false.

FOR INTERPRETERS.

Oath.

I swear that I will well and truly interpret,
translate and explain all questions and
answers, and all such matters as the Court
may require me to interpret, translate and
explain.

So help me God.

Affirmation.

I solemnly declare that I will well and
truly interpret, translate and explain all
questions and answers, and all such matters
as the Court may require me to interpret,
translate or explain.

FOR JURORS.

Oath.

I swear that I will justly and truly try
and determine the questions submitted to
the jury in this case, and will give a true
verdict according to the evidence.

So help me God.

Affirmation.

I solemnly declare that I will justly and
truly try and determine the questions
submitted to the jury in this case, and will
give a true verdict according to the
evidence.

*Requests Judges to take care that cases in which
judgment has not been delivered are not included
in returns by the inferior Courts as decided.*

CIVIL CIRCULAR ORDER No. 13.

*From the Registrar of the High Court of
Judicature at Fort William in Bengal,
Appellate Jurisdiction, to all District
Judges and Judicial Commissioners,
dated the 19th June 1873.*

(Civil Side.)

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief
Justice, and the Hon'ble L. S. Jackson, the
Hon'ble F. A. Glover, and the Hon'ble
W. Ainslie, *Judges.*

It has recently come to the knowledge of
the Court that a Subordinate Judge, now
dead, had been accustomed to show as
decided, in his monthly and quarterly returns,
cases in which no judgment had been
delivered, although a decision had been
announced and noted in the diary; the
judgments in such cases being afterwards
prepared and signed as leisure permitted.

2. The Court find it necessary to
point out that such a practice is reprehensible
as being not merely opposed to law, but
productive of mischief in various ways, and
also amounting to a misrepresentation of
facts.

3. It is the duty of District Judges to take care that no such practice prevails in the Courts under their control; and the means of prevention are simple. The Judge, whenever he inspects an inferior Court, should examine the diary, and, calling for some of the cases last decided, should satisfy himself that the judgments have been given in correspondence with the diary entries.

4. But the Court believe that, where the District Judges' control is perfectly maintained, such irregularities will not occur at all, and that such mechanical check will need only formal observance.

Rescinds Circular of June 1865, and calls for a yearly return showing whether any Subordinate Judge or Moonsiff, or the wife of such officer, holds lands, &c., in district in which officer serves.

CIVIL CIRCULAR ORDER No. 14.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all District Judges, dated the 9th July 1873.

(Civil Side.)

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble L. S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble E. G. Birch, *Judges*.

THE Court think it necessary to be informed whether any Subordinate Judge or Moonsiff, or the wife of any such officer (whether in her own right of inheritance or purchase or by gift or by assignment in lieu of dower) holds any immoveable property, or is a tenant under any zemindar resident, or holding property in the district in which the officer serves, or to which it may be proposed to appoint him.

2. The Court accordingly direct that the fact of holding such property, or being such tenant, be reported in every case, and that a return in the annexed form be submitted annually by every District Judge with the yearly statements.

3. Circular Order No. 11, dated 12th June 1865, is hereby rescinded.

REMARKS.	
If held under superior Landlord, his Name and Place of Residence with District.	
Mode of Acquisition, whether by Inheritance, Gift, Purchase, or otherwise, with date of Acquisition if otherwise than by Inheritance.	
Whether held in his own Name, or in the Name of another, or by Wife.	
Nature of Property and Extent of Interest held.	
DISTRICTS.	

Requests Sessions Judge and Magistrates to specify in warrants the date from which sentence is to take effect in the case of prisoners re-arrested after escaping.

CRIMINAL CIRCULAR ORDER No. 9.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Sessions Judges and Magistrates, dated the 15th July 1873.

(Criminal Side.)

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble L. S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble E. G. Birch, *Judges*.

At the instance of the Government of Bengal, the High Court directs that all

Sessions Judges and Magistrates, when passing sentences, after their rearrest, on prisoners who have escaped, will carefully comply with the provisions of Section 316 of the Code of Criminal Procedure, and specify in the warrant the date from which sentence is to take effect, whether at once, or after a lapse of a period equivalent to the portion of the prisoner's original sentence which remained unexpired at the time of his escape; the date on which the original sentence, of which the currency was interrupted by the escape, will expire being clearly shown.

The Quarterly Statements A, B, and C need not show the names of the officers; but Judges to collect the required information for their yearly reports.

CIVIL CIRCULAR MEMO. No. 12.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 15th July 1873.

(Civil Side.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

ALL District Judges and Judicial Commissioners are reminded* that the quarterly statements of civil work (A, B, & C) are not intended to show the work of individual officers; but are merely returns of the state of business of the several Courts; and officers' names therefore need not be given.

2. The information will, however, continue to be collected by the Judges with a view to their yearly reports on the character, qualifications, and merits of their subordinates.

* Vide Circular Order No. 28, dated 12th October 1871; —16 W. R., Civil Cir., 11.

Circulates India Government Resolution requiring every order for the payment of money from a Government Treasury to be in English, unless Presiding Officer is not acquainted with that language, when the order is to be both in the Vernacular and in English.

CIVIL CIRCULAR ORDER No. 15.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Courts subordinate to the High Court, dated the 19th July 1873.

(Civil Side.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble E. G. Birch, *Judges.*

THE following Resolution of the Government of India, in the Financial Department, bearing date 20th June 1873, No. 1079, is circulated for the information and guidance of all Civil Courts subordinate to the High Court:—

RESOLUTION.

"In order to avoid the inconvenience and risk which accompanies the payment of money upon proceedings recorded in the Vernacular languages, and to ensure caution in the issue of such orders, the Governor-General in Council is pleased to direct that every order issued by a Court or Office for the payment of money from a Government treasury shall be in English, unless the presiding officer is not acquainted with the English language.

"Where the disbursing officer does not understand English, and the officer ordering the payment does, the order for payment shall be both in the Vernacular and in English."

by District Judge of a person to act as Moonsiff to be shown in Pay Abstract, and to be sent to Accountant-General and to the Court.

CIVIL CIRCULAR MEMO. No. 13.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all District Judges, dated the 21st July 1873.

(English Department.)

- WHENEVER a District Judge, on the occurrence of any vacancy in the office of Moonsiff, appoints a person to act in such office, the appointment should be distinguished in the Pay Abstract by words such as, "Temporary, officiating by order of District Judge, Section 9 Act VI of 1871," and every such appointment should be reported to the Accountant-General as well as to the Court.

Circulates correspondence regarding the recording of confessions by Magistrates with their own hands.

CRIMINAL CIRCULAR MEMO. No. 7.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to Sessions Judges and Magistrates, dated the 30th July 1873.

(Criminal Side.)

THE correspondence reproduced below is forwarded for the information and guidance of Sessions Judges and Magistrates.

Extract, paragraphs 1, 2, and 3, from a letter from the Officiating Additional Sessions Judge of ———, No. 162, dated the 10th July 1873.

(1) In all criminal cases which come before me from Native Deputy Magistrates, I find that while all the witnesses' depositions are written by the Deputy Magistrates with

their own hands, directly the confession of a prisoner has to be recorded, the Magistrate allows a mohurrir to write it, and contents himself with making English notes of the substance of the confession, though it is needless to remark that the importance of having an accurate record of the statement made is far the greater with respect to confessions.

(2) I wrote six months ago to the Magistrate of ——— on the subject a letter, a copy of which I enclose; but I do not find that any attention is paid to it, and the matter has just been prominently brought to my notice at the recent Sessions at ——— when a Deputy Magistrate admitted before me, when I examined him about a confession recorded in his presence, that he allowed the Police officer, who had brought in the man, to be present while the confession was recorded by a mohurrir and to suggest questions to be put to the confessing prisoner.

(3) I asked the Deputy Magistrate why he had not written the confession himself. He said that the law did not make it compulsory on him to do so.

From W. M. SOUTTAR, ESQ., Registrar of the High Court of Judicature at Fort William in Bengal, to the Officiating Additional Sessions Judge of ———, No. 1047, dated Calcutta, the 30th July 1873.

I am directed to acknowledge the receipt of your letter No. 162, dated 10th instant, in which you suggest the issue of instructions with a view to secure the recording of confessions by Magistrates with their own hands.

2. I am to observe in reply that the Court are unable to take away by order a discretion which the law (Section 346 Criminal Procedure Code) allows a Magistrate; for this matter does not come within Section 335. But they agree with you that it is not proper to allow the Police officer, who brought the prisoner, to be present while the confession is being recorded by a mohurrir and to suggest questions to be put to the confessing prisoner. The Court would not be much inclined to attach weight to a confession obtained under such circumstances, though the confession might be admissible; but the course taken suggests that the Deputy Magistrate was not really conducting the inquiry himself.

Records of Subordinate Courts to be sent to Judges quarterly, except in contested cases, which are to be forwarded monthly.

CIVIL CIRCULAR ORDER No. 16.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Subordinate Courts, dated the 30th July 1873.

(Civil Side.)

In modification of the rules contained in paragraphs 9 and 10 of Circular Order No. 49, dated 20th September 1839, for the monthly transmission of records from the Courts of Principal Sudder Ameeris (now Subordinate Judges) and Moonsiffs for deposit in the District Judge's office, the Court is pleased to direct that, with the exception of contested cases, the records in question be sent in quarterly, by such dates as the District Judge may prescribe, instead of once a month. The records of contested cases will be forwarded monthly as heretofore.

Court Fee Stamps for processes should be put in with application and fixed on process at once, and postage labels should not be received until party desires process should be actually transmitted.

CIVIL CIRCULAR ORDER No. 17.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Authorities, dated the 2nd August 1873.

(English Department.)

A QUESTION having been raised as to whether there should be any refund, and, if so, how it should be effected, of the value of Court fee stamps filed on account of processes which are not eventually issued, and of postage labels put in on account of letters which have not been despatched, the High Court is pleased to prescribe, for general adoption by all civil authorities subject to it, the course indicated below as obviating the necessity for any refund at all.

2. As regards stamps furnished by parties for processes, the Court directs that when the stamps are put in, as they ought to be, with an application for process, the process shall be prepared and the stamp affixed to it and immediately punched, leaving the party

to issue it or not as he thinks fit. Labels ought not to be received until the party desires that the process be actually transmitted by post, and in case the process shall be so transmitted

Directs that all bills of Small Cause Judges should be transmitted to the Judge of the District for the purpose of being checked, but the scale of contingent expenditure estimated for yearly to be submitted to the Court for approval and incorporation in the budget for the year.

CIVIL CIRCULAR ORDER No. 18.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to District Judges and Small Cause Court Judges, dated the 4th August 1873.

(English Department.)

HIS HONOR the Lieutenant-Governor having approved of the Registrar of the High Court being relieved of the duty of checking contingent bills of Small Cause Courts, and of the audit for these, as it is for all other Courts of inferior rank being entrusted to District Judges, the Court is pleased to direct that all bills for travelling allowance, stationery charges, and other contingent expenditure incurred by the Courts of Small Causes in a District be submitted in future to the Judge of that District, instead of, as heretofore, to the High Court.

2. At the desire of the Lieutenant-Governor, the Court, however, continues to retain, for the present, the control of the general expenditure on account of contingent charges of Small Cause Courts, and it is accordingly directed that Small Cause Court Judges apply, before the beginning of each official year, for general sanction to the scale of contingent expenditure estimated for, with a view to the preparation of the budget for the year. The scale in question must be submitted for the approval of the Court, in time for check and control being exercised upon it before it is included in the budget.

3. A copy of the scale in each case, after it has received the sanction of the Financial Department in the budget, will be forwarded by the Accountant-General for the information and guidance of the District Judge within whose District the Small Cause Courts to which it relates are situated.

Appointment as Moon sent instructions supersede, as far as Small Cause Courts are concerned, the orders contained in the Circular specified on the margin, to which, nevertheless, the attention of District Judges drawn as giving information regarding the system under which the Court has heretofore audited the contingent bills in question, which it will henceforward be their duty to countersign and pass.

Promulgates new rules concerning the levy of fees on sale of moveable and immoveable property in execution of decrees in Civil Courts.

CIVIL CIRCULAR ORDER No. 19.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Courts, dated the 6th August 1873.

(English Department.)

THE Circulars noted in the margin are hereby rescinded; and the following rules (which have received the sanction of His Excellency the Viceroy and Governor-General in Council,* as provided by 24 & 25 Vict., c. CIV, s. 15) concerning the levy of fees on the sale of moveable and immoveable property in execution of decrees in the Civil Courts subordinate to the High Court, are hereby promulgated and are to be strictly observed:—

I. There shall be levied in every case of a sale in execution an *ad valorem* fee at the

rates undermentioned, the amount whereof shall be credited to Government, whether the sale be conducted by the Court itself or by an officer of the Court, or by any public officer under its orders.

<i>Nature of Case.</i>	<i>Rate of Fee.</i>
When the price does not exceed Rs. 1,000 ...	One rupee on every hundred or part of a hundred.
When the price exceeds Rs. 1,000, but does not exceed Rs. 10,000 ...	On Rs. 1,000 as above, and on the surplus up to Rs. 10,000, one-half rupee on every hundred or part of a hundred.
When the price exceeds Rs. 10,000	On Rs. 10,000 as above, and on the surplus, one-quarter per cent.

Provided that the amount of fee shall never be less than Rs. 5 upon immoveable property.

II. Such minimum fee of Rs. 5 shall, in every case, be deposited by the party applying for execution before the proclamation of sale of immoveable property, under Section 249 of the Code of Civil Procedure, shall issue, and such fee shall be recoverable, in the discretion of the Court, as part of the costs of execution.

Prescribes form of diary for attendance of witnesses in civil cases.

CIVIL CIRCULAR ORDER No. 20.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Courts, dated the 14th August 1873.

(English Department.)

THE Court is pleased to prescribe, for general adoption by all Civil Courts, the annexed form of a diary intended to show the attendance of witnesses.

2. The witness on reporting himself to the Nazir or other officer of the Court is

to be entered forthwith in this book, the columns of which are all to be duly and regularly filled up, and the book is to be signed daily by the Judge, Subordinate Judge, or Moonsiff, presiding in the Court.

Instructions for the better arrangement of business, &c., for sales of property when sold by Civil Courts in execution of decree.

CIVIL CIRCULAR ORDER No. 21:

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all District Judges, dated the 18th August 1873.

(English Department.)

IN order to the better arrangement of business and the obtaining of better sales when property is sold by Civil Courts in execution of decree, the Court is pleased to direct that every District Judge shall appoint a certain fixed day in each month on which, at an hour to be named, all sales of immoveable property in execution of decrees in his own Court and in the inferior Courts at the Sudder Station shall be held. No sale of immoveable property shall take place except on such fixed date or on the next open day (to which any sale not completed on the said fixed date may be adjourned). The notification of sale prescribed by Section 249, Code of Civil Procedure, shall be worded in accordance herewith, and the District Judge shall cause to be published in all Courts at the Sudder Station and at the Collector's Office, not less than fourteen days before the date of sale, a list of such property to be sold.

2. The sale shall commence at the hour appointed, and in some suitable part of the Court-house, and the lots shall be sold strictly according to such list by the *Nazir of the District Court*. The sales are to be conducted in a business-like way, *without undue haste*, but not to be unduly protracted.

3. The Judge shall also fix, on the report of the Moonsiffs who are not stationed at head-quarters, a certain day or days for the sale of immoveable property, under similar conditions, at the Court of each Moonsiff, and the sales shall take place in each Court as above directed *mutatis mutandis*.

4. When the sale day in any case falls on a Sunday or other close holiday, the sale shall take place on the first open day thereafter.

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Diary of Witnesses' Attendance

Date of first Attendance.	No. of Case.	Names of Witnesses present.	For Plaintiff or Defendant.	Date of Examination.	Date of Discharge.	Further Attendance, if necessary.	Expenses paid. (Amount.)	Receipt of Witness or Party.	REMARKS.
							Rs. A. P.		

RULES for admission of Vakeels in the High Court:

1. Every person, before being admitted to practise as a vakeel in the High Court, shall have obtained the Degree of Bachelor of Laws in the University of Calcutta, Madras or Bombay.

2. Except as mentioned in Rules 20 and 23, every person, before being admitted as a pleader in the High Court, shall serve a regular clerkship to some attorney or vakeel of the High Court to be approved by the Court before the contract is entered into, under articles of clerkship by contract in writing, pursuant to the rules hereinafter contained, for the full period of two years.

3. The term of service required by the last preceding rule need not be all under one and the same contract, nor to one and the same person, but may be to different persons by virtue of an assignment or assignments, or by virtue of successive independent contracts, upon the dissolution of the original or succeeding contract.

4. The person under whom the articles shall be served shall, during the whole period of the service, be actually practising as an attorney or vakeel in the High Court.

5. No person who is himself acting as clerk to an attorney or vakeel shall be able to take any clerk for service under articles.

6. No person shall be capable of service under these rules until he shall have passed the B.A. examination of the University of Calcutta, Madras or Bombay.

7. The contract in writing whereby a person shall engage as aforesaid to serve as a clerk to any attorney or vakeel shall be filed with the Registrar of the High Court on the Appellate Side within one calendar month after the execution of the same, together with an affidavit by such attorney or vakeel that he has been himself duly admitted, and has been practising for five years as an attorney or vakeel, and that such contract has been duly executed by himself and by the clerk therein mentioned. And in every such affidavit shall be specified the name of the attorney or vakeel and his place of abode or business, and the name of the clerk and his place of abode, together with the day on which the contract was actually executed.

8. In case the articles of clerkship shall be assigned, the assignment shall be in writing, and shall be in like manner filed within one calendar month after the execution thereof, together with an affidavit that

the same has been executed by all the necessary parties. And in every such affidavit shall be specified the name of the attorney or vakeel to whom the articles are assigned and his place of business, together with the day on which the assignment was actually executed.

9. If by reason of death or for any other good and sufficient reason an assignment of the articles cannot be obtained, a fresh contract in writing shall be entered into by the clerk with the person under whom the service is continued, which shall be filed in the manner and with the affidavit prescribed by Rule 8.

10. In case the contract or assignment, together with the necessary affidavit, be not filed within the time specified, the same may be filed with the said Registrar after the expiration thereof; but the service of such clerk shall be reckoned to have been commenced or renewed from the date of filing such contract or assignment unless the Court shall otherwise order.

11. Every person who shall be articleed to serve as a clerk to a vakeel or attorney for the purpose of being admitted as a vakeel shall, during the whole period of such service, continue and be really and actually employed by such attorney or pleader in the proper business, practice and employment of an attorney or vakeel.

12. Before any person shall be admitted as a vakeel in the High Court, he shall sign and file with such Registrar as aforesaid answers to the questions contained in the Schedule A, hereunto annexed; and the person or persons under whom he shall have served his articles shall sign and file answers to the questions contained in the Schedule B, hereunto annexed, as also a certificate in the form given therein.

13. In case the applicant should show sufficient cause to the satisfaction of the Court why the last rule cannot be fully complied with, it shall be in the power of the Court to dispense with any part of this rule which it may think fit and reasonable.

14. The applicant shall in all cases produce satisfactory testimonials as to his good character.

15. The applicant shall also, if required, sign and leave with the said Registrar answers in writing to such other questions as shall be directed by the Court touching the service and conduct of the applicant, and also, if required, attend the Court personally for the purpose of giving further explanation touching the same; and shall also, if required,

procure the attendance of the person or persons with whom he shall have served his clerkship as aforesaid to answer either personally or in writing any questions touching such service or conduct, or shall make proof to the satisfaction of the Court of his inability to procure the same.

16. Upon compliance with the aforesaid rules, if the Court shall be satisfied as to the fitness and capacity of the applicant, a certificate shall be granted to him in the following form :—

In pursuance of the rules of the High Court relative to the admission of vakeels, it is hereby certified that A. B. has complied with the requirements of the said rules, and that he is a fit and proper person to be admitted to practise as a vakeel in the High Court.

(Signed) C. D.;

A Judge of the High Court.

17. Any person intending to apply to be admitted to practise as a pleader in the High Court shall also give one month's notice in writing to the Registrar aforesaid stating his intention, and shall also insert in the *Calcutta Gazette* a like notice for four successive weeks prior to his application.

18. Any person who has been admitted to the Degree of B.L. in the University of Calcutta, Madras or Bombay, and who shall produce the certificate mentioned in Rule 16, shall, after giving the notice required by Rule 17, be enrolled as a vakeel of the High Court.

19. Any person who has been admitted to the Degree of B.L. in the University of Calcutta, Madras or Bombay, and who shall prove to the satisfaction of the Court that he has *bonâ fide* practised for four years as a pleader in one or more of the Courts of the Mofussil subject to the jurisdiction of the High Court, and that he is a person of good character, may, after giving the notice required by Rule 17, be admitted to practise in the High Court as a vakeel without service under articles.

20. Every person applying to be admitted under the last rule shall one month prior to admission leave with such Registrar, as aforesaid, answers to the questions contained in the Schedule C hereunto annexed, and also a certificate or certificates in the form contained in Schedule D hereunto annexed.

21. In case the applicant should show sufficient cause to the satisfaction of the Court why the last rule cannot be complied

with, it shall be in the power of the Court to dispense with any part of this rule upon such terms as it may think fit and reasonable.

22. An applicant under Rule 19, shall in all cases produce satisfactory testimonials as to his good character; and shall also, if required, leave with the said Registrar answers in writing to such questions as the Court shall direct touching the qualification of such person to be admitted as a vakeel in the High Court; and shall, if required, attend the Court personally for the purpose of giving further explanation touching the same.

23. Any attorney of the High Court who shall establish to the satisfaction of the Court that he has *bonâ fide* practised as such for the period of three years, and that he is a person of good character and ability, may be admitted to practise in the High Court as a vakeel.

24. These rules shall come into force on the first day of January 1874.

R. COUCH.

F. B. KEMP.

LOUIS S. JACKSON.

J. B. PHEAR.

A. G. MACPHERSON.

W. MARKBY.

F. A. GLOVER.

DWARKANATH MITTER.

C. PONTIFEX.

E. G. BIRCH.

G. G. MORRIS.

11th September 1873.

SCHEDULE A.

Questions as to due service of articles to be answered by the Applicant.

1. What was your age at your last birthday?

2. Have you served the whole term of your articles at the place where the person or persons to whom you were articulated or assigned carried on his or their business? and, if not, state for what reason.

3. Have you at any time during the term of your articles been absent without the permission of the person or persons to whom you were articulated or assigned? and, if so, state the length and occasions of such absence.

4. Have you during the period of your articles been engaged, or concerned, in any, and, if any, what profession, business or employment, other than your professional employment as clerk to the person or persons to whom you were articulated or assigned?

5. Have you since the expiration of your articles been engaged or concerned, and for how long a time, in any, and, if any, what profession, trade, business or employment, other than the profession of an attorney or vakeel?

SCHEDULE B.

Questions to be answered and certificate to be given by the person or persons with whom the clerk may have served any part of his time under articles.

1. Has A. B. served the whole period of his articles at the place where you carry on your business? and, if not, state the reason.

2. Has the said A. B. at any time during the period of his articles been absent? and, if so, state the length and occasions of such absence.

3. Has the said A. B. during the whole period of his articles been engaged or concerned in any, and, if any, what profession, business, or employment, other than his professional employment as your articulated clerk?

4. Has the said A. B. during the whole period of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney [or vakeel, as the case may be]?

5. Has the said A. B. since the expiration of his articles been engaged or concerned, and for how long a time, in any profession, trade, business or employment, other than the profession of an attorney or vakeel?

And I do hereby certify that the said A. B. has duly and faithfully served under his articles of clerkship [or assignment of articles, as the case may be] bearing date, &c., for the term therein expressed, and that he is a fit and proper person to be admitted as a vakeel of the High Court.

SCHEDULE C.

1. What was your age last birthday?

2. What is the date of your enrolment as a pleader, and where were you enrolled?

3. Have you practised in one or several Courts? State the periods during which you practised in each, and the dates of the beginning and end of each period.

4. Have you at any time been engaged or concerned in any, and, if any, what profession, business, or employment, other than that of a pleader? If so, when and for what period?

SCHEDULE D.

I, C. D., District Judge [or Subordinate Judge or Moonsiff, as the case may be] do certify that to the best of my belief A. B. practised in my Court regularly as a pleader from the day of 18 to the day of 18, and that he was diligent and faithful in the performance of his duties, and that he is a fit and proper person to be admitted as a vakeel of the High Court.

(Signed) C. D.

RULES drawn up in accordance with Section 4, Act XX of 1865, for the Qualification, Admission, and Enrolment of Pleaders and Mooktears in Mofussil Courts.

1. Pleaders in the Mofussil Courts of the Regulation Provinces, within the limits of the jurisdiction of the High Court, shall, as regards qualification, be of two grades.

2. Those of the higher grade shall be competent to appear, plead, and act in any Civil or Criminal Court subordinate to and within the limits of the general jurisdiction of the High Court, and also before the Board of Revenue or in any Revenue Court or Office within the said limits: Provided that they shall not appear, plead, or act in the High Court.

3. Those of the lower grade shall be competent to appear, plead, and act in the Courts of Moonsiffs, and in Small Cause Courts and in the Courts of Officers in the District of Cachar, and the Divisions of Assam, Chota Nagpore, and Cooch Behar, exercising the powers of Moonsiffs under the Bengal Civil Courts Act, 1871.

4. Mooktears duly admitted and enrolled may, subject to the conditions of their certificates as to the class of Courts in which they are authorized to practise, appear and act in any Civil Court, and may appear, plead, and act in any Criminal Court within the same limits: Provided that they shall not appear, plead, or act in the High Court.

5. The Examiners hereinafter mentioned shall be the persons appointed to be Examiners by the Lieutenant-Governor of Bengal under the provisions of Act XX of 1865.

Qualifications for Pleaders of the higher grade.

6. Every person may be admitted as a pleader of the higher grade who shall be

qualified as hereinafter prescribed, that is to say:—

1st.—If he shall have obtained the Degree of Bachelor of Law of one of the Universities of Calcutta, Madras or Bombay, or shall be a Licentiate in Law of one of the said Universities: Provided that his application for admission as a pleader be made within one year from the time of his obtaining such Degree or Licence, or within such further time as the High Court shall for any special reason allow; or

2nd.—If he produce a certificate from the Examiners that he has passed in the first class an examination in the subjects prescribed from time to time by the High Court for such examination.

Such subjects shall until further order by the Court be as follows:—

HIGHER GRADE.

<i>Subject.</i>	<i>Regulations, Enactments, and Text Books.</i>
1st.—The law of property current in Bengal—	
A.—With reference to the permanent settlement; to the Government lien on land; to claims to hold land exempt from the payment of revenue, and to the mode in which estates can be brought to sale for arrears of revenue.	Regulations (Bengal) I, VIII, X, XIV, XIX, and XLIV of 1793, and the Regulations and Acts by which the same have been altered; Act XI of 1859, and the preamble to Regulation (Bengal) II of 1793.
B.—The law of under-tenures, and the mode in which the same can be brought to sale for arrears of rent.	Regulation (Bengal) VIII of 1819; Act VIII of 1865 (Bengal Council); Act VIII of 1869 B.C. (Except as to candidates to practise in Orissa, Chota Nagpore, and Assam, who will be required, as heretofore, to pass in Act X of 1859).
C.—The relation of landlord and tenant.	Act VIII of 1869 B.C. except as above.
D.—Mortgages, Registration of Assurances.	Macpherson on Mortgages; Act VIII of 1871.

<i>Subject.</i>	<i>Regulations, Enactments, and Text Books.</i>
E.—The Hindoo Law of Inheritance, Succession and Adoption.	Dayabhaga and Mitakshara; Dattaka Chundrika, and Macnaghten's Principles of Hindoo Law, first seven chapters.
F.—Mahomedan Law.	Macnaghten's Principles of Mahomedan Law, except chapter 9.
G.—The Indian Succession Act.	Act X of 1865; Act XXI of 1870.
2nd.—Obligations arising from contracts.	Macpherson on Contracts; Act IX of 1872.
3rd.—Civil Procedure.	Act VIII of 1859; Act XXIII of 1861; Act XI of 1865.
4th.—The law of evidence.	Act I of 1872.
5th.—The law relating to stamps.	Act XVIII of 1869, and Act VII of 1870.
6th.—The law of limitation.	Act IX of 1871.
7th.—Criminal law and procedure.	The Indian Penal Code (Act XLV of 1860 and Act XXVII of 1870), and the Code of Criminal Procedure, Act X of 1872.

7. The application to the High Court for admission shall be made within one year from the time of the applicant's passing the examination, or within such further time as the Court shall for any special reason allow.

8. In order to qualify a person to present himself for the examination required by these rules for the higher grade—

1st.—He must hold a certificate of having passed the First Arts examination of the University of Calcutta, Madras or Bombay, or the first public examination before Moderators at Oxford, or the previous examination at Cambridge, or the preliminary examination in Arts in one of the Scotch Universities, or the examination in Arts for the second grade at Durham, or the matriculation examination at the University of Dublin or London, or a certificate of having passed some other public examination which shall be certified by not less than three Judges

of the High Court as being in their opinion equivalent to one or other of the above-mentioned examinations.

2nd.—He must hold a certificate of having regularly attended a full course of Lectures in Law at one of the Colleges affiliated to the Calcutta University, or such Law Lectures elsewhere as shall be deemed by the High Court to be sufficient.

3rd.—He must produce a satisfactory certificate of good moral character, and be above the age of 20 years.

9. Every candidate for examination for the higher grade shall, on or before the 1st of November in each year, give notice to the Secretary to the Board of Examiners of his intention to present himself at the ensuing examination, and he shall establish to their satisfaction that he possesses the qualifications declared by Rule 8 to be necessary for such candidates.

10. The Examiners, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age in a register, with a certificate to the effect that the Examiners are satisfied that he possesses the necessary qualifications.

11. Before the date of examination, every candidate for the higher grade shall pay a fee of Rs. 30 into the Government Treasury at Calcutta, and shall produce to the Examiners the receipt for the said sum of Rs. 30.

12. Any person who shall have passed the examination as a pleader of the higher grade, or who shall have obtained the Degree of Bachelor in Law of one of the Universities of Calcutta, Madras or Bombay, or of Licentiate in Law of one of the said Universities, and who shall desire to be admitted to practise, shall pay into the Government Treasury of the district in which he shall intend to practise Rs. 25, and shall on presentation of the certificate of the Examiners or of his Diploma, and the receipt for the said sum of Rs. 25, be entitled to apply to the High Court for admission and enrolment.

13. The application, together with the certificate and receipt required by Rule 12, shall be presented to the Judge of the district in which the applicant intends ordinarily to practise, and shall be forwarded by the Judge to the Registrar of the High Court, with such remarks as he may think fit to make thereon.

14. The name of the applicant and his place of abode, together with his father's

name and place of abode, shall be affixed in some conspicuous place in the Court House of the Judge to whom the application is sent, and also in the High Court, at least six weeks before the applicant is admitted to practise.

15. The High Court may call for evidence of the respectability of the applicant in any case in which it may be deemed necessary.

16. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar of the High Court to the Judge of the district, who, upon the applicant's delivering and leaving with him a declaration in writing signed by the said applicant in conformity with the recital in the form of certificate given in the 2nd Schedule to Act XX of 1865, shall grant him a certificate as required by the said Act.

Qualifications for Pleaders of the Lower Grade.

17. Every person may be admitted as a pleader of the lower grade who shall produce a certificate from the Board of Examiners that he has passed in the second class an examination in the same subjects as are prescribed for pleaders of the higher grade under the provisions of Rule 6.

18. The application to the High Court for admission shall be made within one year from the time of the applicant's passing the examination, or within such further time as the Court shall for any special reason allow.

19. In order to qualify a person to present himself for examination for the lower grade—

1st.—He must hold a certificate of having passed the Entrance Examination of the University of Calcutta, Madras or Bombay in the First or Second Class, or the first public examination before Moderators at Oxford, or the previous examination at Cambridge, or the preliminary examination in Arts in one of the Scotch Universities, or the examination in Arts for the second grade at Durham, or the matriculation examination at the University of Dublin or London, or a certificate of having passed some other public examination which shall be certified by not less than three Judges of the High Court as being in their opinion equivalent to one or other of the above-mentioned examinations.

2nd.—He must produce a satisfactory certificate of good moral character, and be above the age of 20 years.

20. Every candidate for examination for the lower grade shall, on or before the 1st November in each year, give notice to the Examiners of his intention to present himself at the ensuing examination, and shall establish to the satisfaction of the said Examiners that he possesses the qualifications declared by Rule 19 to be necessary for such candidates.

21. The Examiners, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age in a register, with a certificate to the effect that they have been satisfied that he possesses the necessary qualifications, and shall furnish the candidate with a copy of, or an extract from, the said register.

22. Before the date of examination every candidate for the lower grade shall pay a fee of Rs. 20 into the Government Treasury, and shall furnish to the Examiners the receipt for the said fee of Rs. 20.

23. Any person who shall have passed for the lower grade under the preceding rules, and who shall desire to be admitted, shall pay into the Government Treasury of the district in which he shall intend to practise Rs. 15, and shall on presentation of the Examiners' certificate and of the receipt for the said sum of Rs. 15 be entitled to apply to the High Court for admission and enrolment.

24. The application, together with the certificate and receipt mentioned in Rule 23, shall be presented to the Judge of the district in which the applicant intends ordinarily to practise, and shall be forwarded by him to the Registrar of the High Court, with any remarks which he may think fit to make thereon.

25. The name of the applicant and his place of abode, together with his father's name and place of abode, shall be affixed in some conspicuous place in the Court House of the Judge to whom the application is sent, and also in the High Court, at least six weeks before the applicant is admitted to practise.

26. The High Court may call for evidence of the respectability of the applicant in any case in which it may think it necessary.

27. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar of the High Court to the Judge of the district, who upon the applicant's delivering and leaving with him a declaration

in writing signed by the said applicant in conformity with the recital in the form of certificate given in the 2nd Schedule to Act XX of 1865, shall grant him a certificate as required by the said Act.

Rules for Mooktears.

28. Every person may be admitted as a mooktear who shall be qualified as hereinafter prescribed, that is to say:—

(1). If he shall be qualified to be admitted as a pleader of either grade: Provided that his application to be admitted as a mooktear shall be made within one year from the time of his obtaining such degree or license, or within such further time as the Court shall for any special reason allow; or

(2). If he shall produce a certificate from the Examiners that he has passed an examination in the subjects prescribed from time to time by the High Court for the examination of mooktears. Such subjects shall until further notice be as follows:—

Code of Civil Procedure.

Law of Limitation.

Stamp Laws.

Small Cause Court Act.

Penal Code.

Code of Criminal Procedure.

Registration Act.

Evidence Act.

Contract Act.

29. In order to qualify a person to present himself for the examination required by these rules for mooktears—

(1). He must hold a certificate of having passed the Entrance Examination of the University of Calcutta, Madras or Bombay, or a certificate of having passed the Vernacular or Minor Scholarship Examination or some other public examination certified by the Director of Public Instruction or by an Inspector of Schools to be equivalent thereto.

(2). He must produce a satisfactory certificate of good moral character, and be above the age of 20 years.

30. Every candidate for examination as a mooktear shall, on or before the 1st of December of each year, give notice to the Examiners of his intention to present himself at the ensuing examination, and shall establish to their satisfaction that he possesses all the qualifications declared by Rule 29 to be necessary for such candidates.

31. The Examiners, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age

in a register, with a certificate to the effect that they have been satisfied that he possesses the necessary qualifications, and shall furnish the candidate with a copy of, or an extract from, the said register.

32. Before the date of examination every candidate shall pay a fee of Rs. 15 into the Government Treasury of the district, and shall furnish to the Examiners the receipt for the said fee of Rs. 15.

33. Any person who shall pass the examination as a mooktear, and who shall desire to be admitted, shall pay into the Government Treasury of the district in which he shall intend to practise Rs. 10, and shall on presentation of the certificate of the Examiners and of the receipt for the said sum of Rs. 10 be entitled to apply to the High Court for admission and enrolment.

34. The application, together with the certificate and receipt required by Rule 33, shall be presented to the Judge of the district in which the applicant intends ordinarily to practise, and shall be forwarded by the Judge to the Registrar of the High Court with such remarks as he may think fit to make thereon.

35. The name of the applicant and his place of abode, together with his father's name and place of abode, shall be affixed in some conspicuous place in the Court House of the Judge to whom the application is sent, and also in the High Court, at least three weeks before the applicant is admitted to practise.

36. The High Court may call for evidence of the respectability of the applicant in any case in which it may think it necessary.

37. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar of the High Court to the Judge of the district, who, upon the applicant's delivering and leaving with him a declaration in writing signed by the said applicant in conformity with the recital in the form of certificate given in the 2nd Schedule to Act XX of 1865, shall grant him a certificate as required by the said Act.

38. If any person having passed the examination entitling him to be admitted and enrolled as a mooktear shall fail to apply for such admission and enrolment for a period of

one year, he shall not be admitted and enrolled, unless by special order of the High Court the time for such application shall be extended.

39. If any person having been admitted and enrolled as a pleader or mooktear shall neglect to take out a certificate, or, having obtained a certificate shall fail to renew it for a period of three years, he shall be suspended, and shall not be entitled to receive a certificate or to have his certificate renewed without further orders of the High Court.

40. Any person who, having been admitted as pleader or mooktear, shall accept any appointment under Government, or shall enter into any trade or other business, shall give notice thereof to the High Court, who may thereupon suspend such pleader or mooktear from practice, or pass such orders as the said Court may think fit.

41. Any person who shall hold any appointment under Government, or shall carry on any trade or other business at the time of his application for admission as a pleader or mooktear, shall state the fact in his application for admission, and the High Court may refuse to admit such person, or pass such orders thereon as it thinks proper.

42. Any wilful violation of any of the above rules shall subject a pleader or mooktear to suspension or dismissal.

43. These rules shall come into force on the 1st day of January 1874, except so far as they relate to the qualifications required by Clause 1 of Rules 8, 19, and 29, respectively, as to which the rules now in force shall continue until the 1st of January 1875.

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPIERSON.
W. MARKBY.
F. A. GLOVER.
DWARKANATH MITTER.
C. PONTIFEX.
E. G. BIRCH.
G. G. MORRIS.

11th September 1873.

Warns officers to guard against Revenue Agents practising as mookhtears without renewing their certificates in that capacity.

CRIMINAL CIRCULAR MEMO. No. 8.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to Sessions Judges and Magistrates, dated the 19th August 1873.

(English Department.)

THE High Court deems it necessary to warn Sessions Judges and Magistrates to take care that parties holding certificates as Revenue Agents do not practise as Mookhtears without renewing their certificates in that capacity.

Warrants of imprisonment directed to Superintendent of District Jails to be in English, and warrants directed to keepers of sub-divisional lock-ups to issue in the Vernaculars, except in a certain specified case.

CRIMINAL CIRCULAR ORDER No. 10.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to Sessions Judges and Magistrates, dated the 27th August 1873.

(English Department.)

IN continuation of Circular Order No. 5, dated 11th March last, the Court is pleased, with the concurrence of His Honor the Lieutenant-Governor, to direct that warrants of imprisonment directed to Superintendents of District Jails shall be in the English language, and that warrants directed to the keepers of sub-divisional lock-ups shall issue in the Vernacular, except where the sentence is for imprisonment of a longer term than fifteen days, in which case the warrants issued by sub-divisional authorities shall, if possible, be in English.

Gives instructions as to the preparation of revised forms of Quarterly Statements D and E.

CRIMINAL CIRCULAR ORDER No. 11.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to Sessions Judges and Magistrates, dated the 10th September 1873.

(English Department.)

THE orders noted on the margin are hereby

C. O. No. 31, dated 4th November 1870, paras. 7 to 9. *rescinded, and the Quarterly Statements D and E will henceforth be submitted by*

the Sessions Judges to the High Court in the revised form now circulated, commencing with those for the 3rd quarter of 1873.

2. Statements received in other than the printed forms supplied by the Superintendent of Stationery will be returned, and the district will be dealt with as if no statements had been received.

3. The statements will continue to be sent in duplicate, as required by Circular Memo. No. 4, dated 7th June last.

4. Column 1 of Statement D will comprise the names of all officers exercising criminal authority in the district, the letters "C. S." being inserted after the names of Covenanted Officers. Magistrates, other than the Magistrate of the district, will be designated according to their powers as Magistrates of the 1st class, of the 2nd class, or of the 3rd class; and not as Joint Magistrates, Assistant Magistrates, or Deputy Magistrates.*

5. The Benches of Magistrates which have sat in the quarter under report will also be entered here, and the names of the Magistrates who have served on them will be shown in the column of Remarks, instead of on the back of the statement, as required by Circular Memo. No. 3, dated 26th May last.

6. Columns 3, 4, and 5 will be filled up according to the instructions contained in Statement D. Circular Order No. 7, dated 10th April last,

* Magistrate of the district.

A. Jones, Esq., c.s., 1st class.

B. Williams, Esq., 1st class.

Baboo M. N. Dass, 1st class.

C. Howell, Esq., c.s., 2nd class.

M. Anwar Ali, 2nd class.

&c., &c.

to which it may be added that column 5, "acquitted," will show all dismissals (as under Section 205) and discharges (as under Section 496) which operate as acquittals. New trials ordered under Section 328 will appear in column 8. The persons shown as "remaining under trial" at the close of one quarter should be included (though not separately exhibited) in column 3 of the return for the following quarter, as "persons under trial." Cases decided by Municipal Commissioners should not be entered in this statement.

7. This statement is intended to comprise all appeals preferred Statement E.

Judge, or to the Magistrate, without detail of the officers from whom the appeals may be preferred; and also references made to the High Court under Section 296, Act X of 1872, either by the Sessions Judge or by the Magistrate. Persons whose cases are shown as "pending" in column 10 should be included in the number entered in column 2 of the ensuing quarter's returns.

8. After the Magistrate has prepared and signed Part I, of Statement D, and filled up his portion of Statement E, the statements will be submitted to the Sessions Judge, who will enter, in Part II, Statement D, the result of trials disposed of by him; and, in Statement E, the result of appeals preferred before his Court. He will then forward the completed return to the High Court.

9. Both Magistrates and Judges are called upon to see that the statements are prepared *neatly*, as well as correctly, in respect of the entries made, and that they are not disfigured by slovenly or bad writing. On such cases occurring, the statements will be liable to be returned.

10. The column of remarks, which in each statement is of ample size, will contain the mention of any cases or particulars which do not appear to be fairly provided for in other columns, and will also contain brief explanations of any noticeable results appearing on the face of the returns, specially of such as if unexplained might lead to erroneous conclusions: in short, any comments that will tend to throw light on the figures.

11. This return will not interfere with the submission of the Statement No. III prescribed by Circular Order No. 10, dated 12th July 1870.

D.—PART I.—MAGISTRATES.

Statement of Offences reported and of Persons tried, convicted, and acquitted in the District of in the Quarter of the year 187

1	2	3	4	5	6	7	8	9
DESIGNATION OF MAGISTRATES.	Number of Offences reported during Quarter.	Number of Persons under Trial during Quarter.	Discharged without Trial.	Acquitted.	Convicted.	Committed.	Remaining under Trial.	REMARKS.
Total	...							

Magistrate of the District.

D.—PART II.—COURT OF SESSION.

Statement of Commitments in the District of _____ for the _____ Quarter of the year 187

1	2	3	4	5	6	7	8	9	10	11
DESIGNATION OF COMMITTING OFFICER.	Commitments pending at close of last Quarter.	Commitments made in the Quarter.	Persons acquitted or discharged.	Persons convicted.	Sentenced capitally.	Remaining for Trial.	REMARKS.			

E.

Statement showing the Result of Appeal and Revision in Criminal Cases in the District of _____ during the _____ Quarter of the year 187

1	2	3	4	5	6	7	8	9	10	11
APPELLATE TRIBUNAL.	Number of Appellants or Petitioners under Section 205, C. Cr. P.	Appeals or Applications rejected.	Sentences confirmed.	Sentences reversed.	Sentences enhanced.	Sentences reduced or otherwise altered.	Further Inquiry ordered.	Referred to High Court.	Pending.	REMARKS.
Court of Session										
Magistrate of District										
Total										

Magistrate of the District.

Sessions Judge.

Prescribes form for commissions under s. 175 Act VIII of 1859; for the examination of witnesses.

CIVIL CIRCULAR ORDER No. 22.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Courts, dated the 23rd August 1873.

(English Department)

In continuation of Circular Order No. 10, dated 31st May last, the Court is pleased to prescribe, for general adoption in all the Civil Courts subject to its control, the accompanying form for commissions issuing, under Section 175, Act VIII of 1859, for the examination of witnesses.

COMMISSION TO EXAMINE WITNESSES.

In the Court of the Judge of District Original Suit (or Appeal) No. of 187.

Plaintiff,

versus

Defendant.

To

Commissioner on behalf of the

(Plaintiff or Defendant).

WHEREAS it is necessary to examine the person (or persons) named in the margin as a witness (or witnesses)

on behalf of (the plaintiff or defendant) in the above-mentioned case,—you are hereby appointed Commissioner with full power and authority to examine the said witness (or witnesses) upon the interrogatories hereunto annexed: And you are further empowered

and commanded that you do, at certain days and places to be appointed by you for that purpose, cause the said witness (or witnesses) to come before you, and then and there examine him (or each of them) upon the said interrogatories, either on his (or their respective) oath (or oaths) or affirmation (or affirmations) secondly specified in the Schedule hereunto annexed, to be first taken before you in such solemn manner as is or may be authorized by law: And that you do take such examination (or examinations) and reduce the same into writing; and when you shall have so taken and reduced the same into writing as aforesaid, you are to send the same to this Court, within days from the date hereof, closed up under your hand and seal, distinctly and plainly set, together with the said interrogatories and this writ: And you are further commanded that, before you act in the swearing or examining the said witness (or witnesses), you do take the oath or affirmation first specified in the Schedule hereunto annexed.

Dated this day of in the year one thousand eight hundred and seventy-

(Seal of the Court.)

District Judge.

I.—The Commissioner's Oath.

I swear that I will, according to the best of my skill and knowledge, truly, faithfully, and without partiality to any of the parties in this case, take the examinations and depositions of such witness (or witnesses) as may be produced before me.

So help me God.

The Commissioner's Affirmation.

I solemnly declare that I will, according to the best of my skill and knowledge, truly, faithfully, and without partiality to any of the parties in this case, take the examinations and depositions of such witness (or witnesses) as may be produced before me.

II.—The Witnesses' Oath.

I swear that the evidence which I shall give in this case shall be true, that I will conceal nothing, and that no part of my evidence shall be false.

So help me God.

The Witnesses' Affirmation.

I solemnly declare that the evidence which I shall give in this case shall be true, that I will conceal nothing, and that no part of my evidence shall be false.

Points out course which should be pursued where application is made for enrolment as Pleader or Mooktar in a district other than that in which the examination was passed.

CIVIL CIRCULAR ORDER No. 23.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Authorities, dated the 11th September 1873,

(English Department.)

THE Court is pleased to direct, with reference to applications for enrolment as

Note.—Christians, to whom the oath is administered, will be sworn upon the New Testament. To others the oath will be administered upon such symbol, or accompanied by such act, as may be usual, or as the persons taking the oath may acknowledge to be binding on their conscience.

Pleaders or Mooktars made by persons who have passed the examination contemplated by the Rules drawn up under Section 4 Act XX of 1865, that where the application is made in a district different from that in which the examination was passed, it must be accompanied by a letter from the Judge of the District in which the applicant passed, or in which he received permission to appear at the examination, certifying that such person has stated his desire to practise in the district named; and setting forth the reasons, together with a statement of the certifying Judge's belief, that the application is *bonâ fide*.

2. Such letter shall be granted upon a petition presented in open Court, and notice of such petition shall be first stuck up in a conspicuous part of the Court-house for 14 days.

Draws attention to rules which direct that applications for leave on the part of District Judges, Subordinate Judges, and Small Cause Court Judges, should be submitted through the High Court to the Government.

CIVIL CIRCULAR MEMO. No. 15.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all District Judges, Subordinate Judges, and Small Cause Court Judges, dated the 12th September 1873.

(English Department.)

THE attention of District Judges, Subordinate Judges, and Judges of Small Cause Courts is called to the rules, which direct that applications for leave on the part of such officers should be submitted, through the High Court, to the Government.

Circulates letter from Accountant-General, Bengal, and requests Judges to report to that officer every case of appointment by them of an officiating Moonsiff.

CIVIL CIRCULAR MEMO. No. 16.

(English Department.)

Present :

The Hon'ble Louis S. Jackson, Judge.

COPY of the following letter is forwarded to the Judge of , with a request that he will attend to its instructions.

By order of the High Court,

W. M. SOUTTAR,

Registrar.

FORT WILLIAM, }
The 16th Sept. 1873. }

No. $\frac{S}{292}$.

From the Accountant-General, Bengal, to the Registrar, High Court, dated the 8th September 1872.

SIR,

I would be much obliged by your issuing an instruction to Judges to report to this office every case of appointment by them of an officiating Moonsiff. Much inconvenience is caused by the necessity of my having to make enquiries in every case where a new name appears.

2. The report should contain the name of the officer appointed, whether he is a Government servant, the office to which he is appointed, and the occasion of the appointment. The date of joining should also be communicated either with the first report (which will be a good enough time if it is kept back, till the officer joins), or in a subsequent separate report.

Circulates Home Department Notification warning officers to be careful in granting certificates to their subordinates.

CIVIL CIRCULAR MEMO. No. 17.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 4th November 1873.

(English Department.)

THE following Notification by the Government of India, Home Department, dated the 17th October last, is circulated for the information and guidance of all judicial officers, and the Court enjoins the strictest compliance with the instructions therein laid down.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

No. 3204.

HOME DEPARTMENT.

Public.

Simla, the 17th October 1873.

NOTIFICATION.—As there is reason to believe that the orders of this Department, dated the 15th June 1869, warning public officers to be careful in granting certificates to their subordinates, are not generally known or acted upon, those orders are here below republished for general information;

IN supersession of such portion of Circular Order No. 32, dated 8th November 1870,

The first letter from the
University - 2 pages in length.
Linné's name is mentioned.
No 26 is the last one.

as declares the Statements named on the margin to be no longer necessary, the Court is pleased to direct the preparation of those Statements for the year 1873 and for future years, in accordance with the instructions contained in Circular Order No. 6, dated 9th March 1870, which should be carefully observed.

2. Those instructions should also guide the Local Courts in filling up columns 19 and 20 of Judicial Statement No. 8 (Circular Order No. 2, dated 8th November 1870), which provide for the exhibition of the average duration of suits contested and uncontested.

3. The Court desire also that, in calculating the duration of cases, whether original suits or appeals, the reckoning be made from the date of institution, and not from that of transfer.

Cases in which the accused is a soldier or person holding any rank in the Army, the warrant should set forth accurately the rank of the prisoner and the Regiment or Military Department to which he belongs.

CRIMINAL CIRCULAR ORDER No. 12.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 28th November 1873.

(English Department.)

In continuation of Circular Order No. 10, dated 27th August 1873, the Court is pleased, at the request of His Honor the Lieutenant-Governor, under instructions from the Government of India, to direct that in all cases where the accused is a soldier or person holding any rank in the Army, the warrant for detention or imprisonment shall set forth accurately the rank of the prisoner and the Regiment or Military Department to which

Again enjoins on District Judges the necessity of showing in Quarterly Returns the number of days devoted to civil work during Quarter.

CIVIL CIRCULAR ORDER No. 19.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 29th November 1873.

(English Department.)

THE attention of District Judges is again called to the necessity of showing in their Quarterly Returns the number of days they devoted to civil work during the period embraced by those returns, the Court having observed that the requirements of Circular Memorandum No. 3, dated 28th February last, have been very frequently overlooked.

Circulates Financial Department and Bengal Office Resolutions, regarding curtailment of expenditure, in consequence of apprehended scarcity in Bengal, and the serious loss of revenue consequent thereupon.

RESOLUTION by the Government of India, Financial Department, No. 2997, dated Fort William, the 14th November 1873.

IN consequence of the failure of the autumn rice crop throughout a large part of the territories administered by the Lieutenant-Governor of Bengal, there is reason to fear that there may be a large expenditure of money for the relief of distress, and a serious loss of revenue.

2. The Viceroy and Governor-General accordingly deems it necessary to invite the attention of Local Governments and Chiefs of Departments to the imperative necessity that is laid upon the Government and its officers for the immediate curtailment of all expenditure that can be reduced, postponed, or dispensed with. The scarcity in Bengal may cause a considerable strain on the general resources of the State, and expenditure that would be proper under ordinary circumstances would be out of place now.

3. His Excellency desires that each officer will take immediate steps to stop any expenditure in the present year that can be prevented, and that all estimates of charge for the coming year, 1874-75, may be re-considered and reduced to the utmost possible extent.

4. No increase of expense should for the present be suggested that can by any means

5. The Viceroy and Governor-General is confident that officers of the Government will recognize the necessity for these instructions, and he looks for their loyal co-operation in giving effect to them.

RESOLUTION (Statistical Department)
of the Government of Bengal, Calcutta,
dated the 21st November 1873.

AD—

A Resolution of the Government of India in the Financial Department, No. 2997, dated the 14th November 1873, inviting the attention of this Government to the imperative necessity of immediate curtailment of all expenditure that can be reduced, in consequence of the large expenditure of money and loss of revenue which may arise from the threatened failure of crops in Bengal.

In circulating these orders to all heads of departments and to Commissioners of Divisions, the Lieutenant-Governor hopes that every possible endeavour will be made by heads of Departments to curtail expenditure far as possible. At the same time His Honor desires that the following projects and undertakings may be postponed:—

(1) Experimental projects in the Opium Department.

(2) Chittagong settlement undertaking.

(3) Orissa field survey.

(4) Avoidable expenditure on jails.

(5) Nepal boundary verification for the present year.

(6) The field survey in Behar, if the Irrigation Department see no objection.

2. With regard to the first project, the Lieutenant-Governor will be glad if the member in charge would issue orders after consulting the agents as to the experimental schemes which can be foregone without jeopardizing the revenue.

CIRCULAR No. 84.

Copies forwarded to the Registrar of the High Court.

CIRCULAR MEMO. No. 20.

Dated Calcutta, the 4th December 1873.

HIGH COURT.

(English Department.)

Copy of the foregoing Circular No. 84 of the Government of Bengal with the Resolution of the Government of India referred to therein, is circulated for the information and guidance of all Civil Courts under the control of the High Court.